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Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Separation of Powers
West's A.L.R. Digest, Constitutional Law 2372, 2620 to 2626
West's A.L.R. Digest, District and Prosecuting Attorneys 8(4), 8(5), 8(6), 8(8)

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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1. In General

§ 447. Nature and scope of executive power

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2626

The core power of the executive branch is to implement or enforce legislative policies as embodied in enacted legislation or as declared by the legislature.

The core power of the executive branch is to implement or carry out legislative policies[1] as embodied in enacted legislation[2] or as declared by the legislature.[3] Therefore, the executive power is a policy execution power.[4]

In the federal realm, the power to make necessary laws is in Congress while the power to execute them is in the President.[5] Criminal prosecution is a core function of the federal executive branch, and this responsibility includes the authority to investigate and litigate offenses against the United States.[6]

The executive power essentially implements laws already in existence[7] although, in performing this function, executive officers may exercise some discretion,[8] and all constitutional acts of power by the executive department have as much validity as if

they proceeded from the legislative department.[9] Executive discretion in the enforcement of laws may apply to both criminal as well as civil matters.[10]

It is the right of executive officers named in the constitution to exercise all the powers properly belonging to the executive department.[11] For example, spending funds,[12] or administering appropriated funds,[13] is an executive power although the executive branch may be precluded from exercising any control over the expenditure of appropriated money in a manner that would affect the legislature's choice of purpose.[14]

Not every state's constitution defines expressly which powers are executive.[15] However, those powers that are conferred upon state officials are generally held to be exclusive, and except in the manner authorized by the constitution, these powers cannot be enlarged or restricted.[16]

Except as empowered by the constitution, executive officers may not act without legislative authority or beyond the limits established by the legislature.[17] Thus, the authority of executive officers to make regulations to enforce a statute is limited to the making of regulations which are within the scope of the power granted[18] and which are reasonable.[19] Expediency does not grant powers to the executive branch which the state constitution has denied.[20]

The adoption of administrative regulations necessary to implement and carry out the purpose of legislative enactments is executive in nature and is ordinarily within the constitutional purview of the executive branch of government.[21] For the constitutional framework to operate as intended, a new governor must possess the power to manage the bureaucracy or administrative agencies and to influence those agencies' rulemaking decisions through his or her appointments and directives.[22]

CUMULATIVE SUPPLEMENT

Cases:

Under constitutional separation of powers, the entire executive power that is vested in a President, who must take care that the laws be faithfully executed, belongs to the President alone, but because it would be impossible for one person to perform all the great business of the state, the Constitution assumes that lesser executive officers will assist the President in discharging the duties of his trust, but these lesser officers must remain accountable to the President, whose authority they wield. U.S. Const. art. 2, § 1, cl. 1; U.S. Const. Art. 2, § 3. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 207 L. Ed. 2d 494 (2020).

National-security policy is the prerogative of the Congress and President. U.S.C.A. Const. Art. 1, § 8; U.S.C.A. Const. Art. 2, §§ 1, 2. Ziglar v. Abbasi, 2017 WL 2621317 (U.S. 2017).

There are limitations on the power of the Executive under Article II of the Constitution and in the powers authorized by congressional enactments, even with respect to matters of national security. U.S.C.A. Const. Art. 2, § 1 et seq. Ziglar v. Abbasi, 2017 WL 2621317 (U.S. 2017).

[END OF SUPPLEMENT]

Footnotes

1 N.Y.—Bourquin v. Cuomo, 85 N.Y.2d 781, 628 N.Y.S.2d 618, 652 N.E.2d 171 (1995).

2 Ala.—Opinion of the Justices, 892 So. 2d 332 (Ala. 2004).
Iowa—In Interest of C.S., 516 N.W.2d 851 (Iowa 1994).
Nev.—N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs, 310 P.3d 583, 129 Nev. Adv. Op. No. 72 (Nev. 2013).

3 Ariz.—State ex rel. Woods v. Block, 189 Ariz. 269, 942 P.2d 428 (1997).

4 Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).

5 U.S.—Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

6 U.S.—In re Jackson, 51 A.3d 529 (D.C. 2012).

7 Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).

8 U.S.—Delay v. U.S., 602 F.2d 173 (8th Cir. 1979).
Ala.—Opinion of the Justices, 892 So. 2d 332 (Ala. 2004).

9 U.S.—U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).
N.Y.—In re Deyo's Estate, 180 Misc. 32, 42 N.Y.S.2d 379 (Sur. Ct. 1943).

10 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

11 U.S.—U.S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974); Cox v. Hauberg, 381 U.S. 935, 85 S. Ct. 1767, 14 L. Ed. 2d 700 (1965); Committee for Consideration of Jones Falls Sewage System v. Train, 387 F. Supp. 526 (D. Md. 1975).
Ill.—People v. Vaughn, 49 Ill. App. 3d 37, 6 Ill. Dec. 932, 363 N.E.2d 879 (5th Dist. 1977).
Mass.—Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978).
Emergency powers
"Emergency" executive power can be unconstitutional usurpation of legislative authority either when executive acts contrary to expressed or implied will of legislature or when legislature has failed to act.
N.J.—Worthington v. Fauver, 88 N.J. 183, 440 A.2d 1128 (1982).

12 Vt.—Hunter v. State, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).

13 Colo.—In re Interrogatories Submitted by General Assembly on House Bill 04-1098, 88 P.3d 1196 (Colo. 2004).

14 N.M.—State ex rel. Schwartz v. Johnson, 1995-NMSC-080, 120 N.M. 820, 907 P.2d 1001 (1995).
As to the spending of public funds as an encroachment on the legislative power, see § 454.

15 Ill.—Administrative Office of Illinois Courts v. State and Mun. Teamsters, Chauffeurs and Helpers Union, Local 726, 167 Ill. 2d 180, 212 Ill. Dec. 627, 657 N.E.2d 972 (1995).

16 Tex.—Perry v. Del Rio, 67 S.W.3d 85 (Tex. 2001).

17 N.H.—Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978).
W. Va.—State ex rel. West Virginia Bd. of Ed. v. Miller, 153 W. Va. 414, 168 S.E.2d 820 (1969).

18 Conn.—Loglisci v. Liquor Control Com'n, 123 Conn. 31, 192 A. 260 (1937).
Wash.—State v. Miles, 5 Wash. 2d 322, 105 P.2d 51 (1940).

19 Conn.—Loglisci v. Liquor Control Com'n, 123 Conn. 31, 192 A. 260 (1937).

20 Kan.—State ex rel. Stephan v. Finney, 251 Kan. 559, 836 P.2d 1169 (1992).

21 Ky.—Legislative Research Com'n By and Through Prather v. Brown, 664 S.W.2d 907 (Ky. 1984).

22 Mich.—Michigan Farm Bureau v. Dep't of Environmental Quality, 292 Mich. App. 106, 807 N.W.2d 866 (2011).

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1. In General

§ 448. Enforcement of laws; criminal prosecutions and executive discretion

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2626
West's Key Number Digest, District and Prosecuting Attorneys 8(5), 8(6)

The prosecution of crime is an executive function, and prosecutors have discretion in the prosecution of defendants.

The prosecution of crime is an executive function,[1] the duty of the executive department being to enforce the criminal laws.[2] Actions to enforce the law are within the special province of the executive branch[3] as is a decision on whether or not to prosecute a particular defendant,[4] what cases to prosecute,[5] the decision as to which charges to file,[6] and when and to whom immunity from prosecution will be granted.[7] Executive discretion in the enforcement of state laws may apply to both criminal actions as well as civil actions.[8] In a noncriminal matter, for example, the executive branch possesses the discretionary authority to decide whether to file dependency petitions.[9]

Deciding whether to plea bargain with a criminal defendant is a function delegated to the executive branch[10] as is the power to decide what evidence of aggravating circumstances to offer at sentencing.[11] The executive branch similarly retains the power to move to vacate a conviction, in addition to dismissing an indictment.[12]

A decision on seeking the death penalty is a prosecutorial function,[13] and the execution of capital punishment is an executive function.[14]

Footnotes

1 Ky.—Flynt v. Com., 105 S.W.3d 415 (Ky. 2003).
Minn.—Johnson v. State, 641 N.W.2d 912 (Minn. 2002).

2 Ky.—Flynt v. Com., 105 S.W.3d 415 (Ky. 2003).

3 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

4 U.S.—U.S. ex rel. Reagan v. East Texas Medical Center Regional Healthcare System, 274 F. Supp. 2d 824 (S.D. Tex. 2003), aff'd, 384 F.3d 168 (5th Cir. 2004).
Cal.—Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).
Mass.—Com. v. Clerk-Magistrate of West Roxbury Div. of Dist. Court, 439 Mass. 352, 787 N.E.2d 1032 (2003).
Prosecutorial discretion is rooted in the separation of powers and due process
Cal.—Gananian v. Wagstaffe, 199 Cal. App. 4th 1532, 132 Cal. Rptr. 3d 487, 273 Ed. Law Rep. 346 (1st Dist. 2011).

5 Minn.—State v. Zais, 790 N.W.2d 853 (Minn. Ct. App. 2010), aff'd, 805 N.W.2d 32 (Minn. 2011).

6 Cal.—Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).
Minn.—Johnson v. State, 641 N.W.2d 912 (Minn. 2002).
S.C.—State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999).

7 Pa.—Com. v. Doolin, 2011 PA Super 133, 24 A.3d 998 (2011).

8 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

9 Cal.—In re M.C., 199 Cal. App. 4th 784, 131 Cal. Rptr. 3d 194 (1st Dist. 2011).

10 Wash.—State v. Rice, 159 Wash. App. 545, 246 P.3d 234, 264 Ed. Law Rep. 400 (Div. 2 2011), aff'd on other grounds, 174 Wash. 2d 884, 279 P.3d 849 (2012).

11 Ariz.—State v. Prentiss, 163 Ariz. 81, 786 P.2d 932 (1989).

12 U.S.—U.S. v. McIntosh, 704 F.3d 894 (11th Cir. 2013), cert. denied, 134 S. Ct. 470, 187 L. Ed. 2d 316 (2013).

13 Miss.—Moody v. State, 716 So. 2d 592 (Miss. 1998).

14 Fla.—Goode v. Wainwright, 448 So. 2d 999 (Fla. 1984).
As to prosecution, parole, and probation as functions of the executive as opposed to the judicial branch, see § 463.

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1. In General

§ 449. Administrative officers and agencies

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2621, 2626

Administrative officers and agencies of the government are, as a rule, a part of the executive department.

An "agency" is a state entity empowered to affect an individual's legal rights or duties in a specific area of law or governmental administration.[1] Administrative officers and agencies of the government belong, as a rule, to the executive department,[2] although the word "administrative" has been held not to be synonymous with "executive" but to be synonymous with "ministerial."[3] Though usually considered a part of the executive branch,[4] the powers exercised by an administrative agency, to the extent that such powers are delegated to it by the legislature, are actually legislative in nature.[5]

The constitutional doctrine of separation of powers mandates that agencies act only within the scope of their delegated authority.[6] Such agencies cannot exercise executive powers specifically delegated to a governor,[7] and even where a governmental branch has properly delegated its authority to an agency, the authority delegated binds the agency which can only exercise the authority that has been retained.[8]

Ministerial functions are inherent and incidental powers of the executive department and are methods of implementation to accomplish or put into effect basic function of such department.[9] The separation of powers doctrine directs administrative agencies to their duty of implementing legislation[10] or the legislature's policy decisions.[11]

In general, executive officers may delegate authority to administrative agencies or officials.[12] On the other hand, executive obligations may not be transferred to the judicial and legislative branches of government.[13] Moreover, executive powers may not be delegated to private or irresponsible persons[14] although delegations to private parties are not invalid when the delegating agency or official retains final reviewing authority.[15]

Footnotes

1 Idaho—Williams v. Idaho State Bd. of Real Estate Appraisers, 157 Idaho 496, 337 P.3d 655 (2014).

2 Kan.—Republic Natural Gas Co. v. Axe, 197 Kan. 91, 415 P.2d 406 (1966).

Teachers

Teacher, when engaged in disseminating state standards of educational excellence, is exercising function of executive department.

Conn.—Stolberg v. Caldwell, 175 Conn. 586, 402 A.2d 763 (1978).

3 Ind.—Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 (1941).

4 Kan.—Republic Natural Gas Co. v. Axe, 197 Kan. 91, 415 P.2d 406 (1966).

5 Wis.—Clintonville Transfer Line v. Public Service Commission, 248 Wis. 59, 21 N.W.2d 5 (1945).

6 Colo.—Hawes v. Colorado Div. of Ins., 65 P.3d 1008 (Colo. 2003).

7 Ind.—Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 (1941).

8 Iowa—Warren County Bd. of Health v. Warren County Bd. of Supervisors, 654 N.W.2d 910 (Iowa 2002).

9 Nev.—Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237 (1967).

10 N.M.—City of Albuquerque v. New Mexico Public Regulation Com'n, 2003-NMSC-028, 134 N.M. 472, 79 P.3d 297 (2003).

11 N.Y.—Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003).

12 U.S.—United Black Fund, Inc. v. Hampton, 352 F. Supp. 898 (D.D.C. 1972).

Pa.—Pennsylvania Retailers' Associations, Reliable, Inc. v. Lazin, 57 Pa. Commw. 232, 426 A.2d 712 (1981).

13 W. Va.—Facilities Review Panel v. Coe, 187 W. Va. 541, 420 S.E.2d 532 (1992).

14 Cal.—People v. Shults, 87 Cal. App. 3d 101, 150 Cal. Rptr. 747 (1st Dist. 1978).

15 U.S.—United Black Fund, Inc. v. Hampton, 352 F. Supp. 898 (D.D.C. 1972).

La.—Louisiana Teachers' Ass'n v. Orleans Parish School Bd., 303 So. 2d 564 (La. Ct. App. 4th Cir. 1974), writ denied, 305 So. 2d 541 (La. 1975).

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1. In General

§ 450. Presidential and gubernatorial power

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620 to 2626

The executive power in the federal government is vested in the President, who, except as other powers are vested in him or her by Congress, has only such powers as are conferred on him or her by the Constitution.

The executive power in the federal government is vested in the President.[1] Under the federal system, Congress is to make laws and the President, acting at times through agencies, is to faithfully execute them.[2] As such, the President cannot delegate the ultimate responsibility or the active obligation to supervise the actions of the executive branch.[3]

Except for any other powers vested in the President by Congress, the President has only such powers as are conferred by the Constitution.[4] Generally, the powers of the President are restricted to recommending laws thought wise, vetoing laws considered bad, and seeing to the faithful execution of laws properly enacted.[5] Although the President's power of executing the laws includes both the authority and responsibility to resolve some questions left open by Congress, it does not include a power to revise clear statutory terms.[6]

Governor.

The governor of a state bears a relation to the state similar to that which the President bears to the United States.[7] As an executive officer, a governor is forbidden to exercise any legislative power or function except as the state's constitution expressly provides.[8] While a governor lacks the authority to change or amend state law since such power falls exclusively to the legislative branch,[9] each new governor must necessarily possess the power and ability to manage the administrative agencies and to influence those agencies' rulemaking decisions through his or her appointments and directives.[10]

When a state constitution gives a power to the governor and only to the governor, only the governor may act,[11] and when a state legislature has placed a function, power, or duty in one branch, there is no authority in the governor to move it elsewhere unless the legislature provides the governor that authority.[12]

CUMULATIVE SUPPLEMENT

Cases:

The President cannot delegate ultimate responsibility to lesser executive officers or delegate the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch. U.S. Const. art. 2, § 1, cl. 1; U.S. Const. Art. 2, § 3. Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—State of Mississippi v. Johnson, 71 U.S. 475, 18 L. Ed. 437, 1866 WL 9457 (1866).

2 U.S.—Utility Air Regulatory Group v. E.P.A., 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014); Medellin v. Texas, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

3 U.S.—Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

4 U.S.—Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952).
Power to wage war as constitutionally denied to President
U.S.—Orlando v. Laird, 317 F. Supp. 1013 (E.D. N.Y. 1970), judgment aff'd, 443 F.2d 1039 (2d Cir. 1971).

5 U.S.—Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952).

6 U.S.—Utility Air Regulatory Group v. E.P.A., 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).

7 Ala.—Morgan County Commission v. Powell, 292 Ala. 300, 293 So. 2d 830 (1974).

8 Cal.—St. John's Well Child and Family Center v. Schwarzenegger, 50 Cal. 4th 960, 116 Cal. Rptr. 3d 195, 239 P.3d 651 (2010).

9 Fla.—Florida House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008).

10 Mich.—Michigan Farm Bureau v. Dep't of Environmental Quality, 292 Mich. App. 106, 807 N.W.2d 866 (2011).

11 Ariz.—McDonald v. Thomas, 202 Ariz. 35, 40 P.3d 819 (2002).

12 Ky.—Brown v. Barkley, 628 S.W.2d 616 (Ky. 1982).

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1. In General

§ 451. Appointment of officers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2626

Generally, the power to appoint to office is intrinsically executive in nature, although executive officers do not have exclusive power to appoint to office, and, unless forbidden by the constitution, such power may be vested by statute in the legislature or the courts.

The power to appoint to an office is intrinsic among the powers of the executive[1] and is included in any general grant of power to the executive branch of government.[2] The power to appoint is not a legislative[3] or a judicial[4] function. For the constitutional framework to operate properly, a new governor must possess the power to influence the administrative agencies' rulemaking decisions by way of his or her appointments.[5] Unless properly authorized, executive officers may not delegate their power to make appointments.[6]

Nonetheless, the power to appoint to an office is not exclusively an executive function,[7] at least not so exclusively an executive function that it may not be exercised by the legislature[8] or by the courts[9] as an incident to the discharge of functions properly

within their respective spheres. Unless forbidden by the constitution, such power may be vested by statute either in the legislature or in the courts.[10]

Footnotes

1 Mass.—Commissioner of Administration v. Kelley, 350 Mass. 501, 215 N.E.2d 653 (1966).
Class of eligibles
Pursuant to its power to set qualifications, Congress may prescribe that appointee to federal office be selected from among those found to be most qualified by competitive examination, but within class of eligibles, President may exercise the power of appointment.
U.S.—Mow Sun Wong v. Hampton, 435 F. Supp. 37 (N.D. Cal. 1977), decision aff'd, 626 F.2d 739 (9th Cir. 1980).

2 U.S.—Municipality of St Thomas & St John v. Gordon, 2 V.I. 107, 78 F. Supp. 440 (D.V.I. 1948).
Miss.—Alexander v. State By and Through Allain, 441 So. 2d 1329 (Miss. 1983).

3 La.—State ex rel. Porterie v. Smith, 184 La. 263, 166 So. 72 (1935).

4 Mass.—Clark v. City Council of Waltham, 328 Mass. 40, 101 N.E.2d 369 (1951).

5 Mich.—Michigan Farm Bureau v. Dep't of Environmental Quality, 292 Mich. App. 106, 807 N.W.2d 866 (2011).

6 N.H.—In re Opinion of the Justices, 88 N.H. 484, 190 A. 425 (1937).

7 Kan.—Sedlak v. Dick, 256 Kan. 779, 887 P.2d 1119 (1995).
Okla.—In re Application of Oklahoma Dept. of Transp., 2003 OK 105, 82 P.3d 1000 (Okla. 2003).

8 § 324.

9 § 444.

10 S.C.—Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 114 A.L.R. 1130 (1935).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

IV. Distribution of Governmental Powers and Functions

D. Executive Powers and Functions

1. In General

§ 452. Removal of officers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2620, 2626

The executive's power to remove officers should not necessarily be implied from the executive's power to appoint officers.

The power to remove from office is not necessarily a part of the inherent power of the governor or other executive officer.[1] In the absence of authority in the constitution, the legislature cannot empower executive officers to remove officials whose offices are created by the constitution.[2] On the other hand, in the case of offices created by the legislature, the power of removal may be vested by statute in the governor[3] or in some other officer or department of the government;[4] the exercise thereof may be made conclusive on the courts.[5]

The President has power to remove an officer appointed by him or her as an incident to the power of appointment or under the constitutional grant of authority to the President or both, in the absence of legislative limitation, regardless of whether such officer is engaged in the exercise of quasi-legislative or quasi-judicial functions.[6]

Footnotes

1 Me.—Sawyer v. Gilmore, 109 Me. 169, 83 A. 673 (1912).

2 Neb.—Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1937).

3 Me.—Opinion of the Justices of Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196 (Me. 1975).

N.C.—James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

Local boards of education

A statute governing the suspension and removal of members of local boards of education, which ultimately vested the power of suspension and removal in the governor, did not violate the constitutional separation of powers; the executive branch of government is constitutionally authorized to carry laws into effect including laws that regulate official conduct.

Ga.—DeKalb County School Dist. v. Georgia State Bd. of Educ., 294 Ga. 349, 751 S.E.2d 827, 300 Ed. Law Rep. 562 (2013).

4 Me.—Opinion of the Justices of Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196 (Me. 1975).

Wis.—State ex rel. Brister v. Weston, 241 Wis. 584, 6 N.W.2d 648 (1942).

5 N.Y.—In re Skinkle, 249 N.Y. 172, 163 N.E. 297 (1928).

6 U.S.—Morgan v. Tennessee Valley Authority, 28 F. Supp. 732 (E.D. Tenn. 1939), judgment aff'd, 115 F.2d 990 (C.C.A. 6th Cir. 1940).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

IV. Distribution of Governmental Powers and Functions

D. Executive Powers and Functions

2. Encroachment on Legislature

§ 453. Executive interference with legislative authority, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2621

Public policy is for the determination of the legislative, not the executive, branch of government, and executive officers may not ordinarily exercise, question, interfere with, or limit powers conferred on the legislature by the constitution. However, they may make rules carrying out the provisions or expressed purpose of statutes or disregard statutes properly declared invalid.

Under the separation of powers doctrine, unless the constitution expressly grants an enumerated legislative power to the executive, the executive does not have the power to perform a legislative function.[1] State constitutions generally divide the powers between the government branches so as to grant the legislature the power to enact laws, the executive branch the power to carry out and enforce those laws, and the judicial branch the authority to hear and determine justiciable controversies.[2] The determination of public policy is within the province of the legislative branch of government, and the executive branch may only apply those policies, and may not itself determine matters of public policy,[3] or substitute its own policy for that of the legislature.[4] Executive decisions usually involve case-specific considerations, not policy-based declarations of rules[5] as

executive powers are policy execution powers.[6] While the executive branch generally has the power and authority to control litigation, it cannot exercise this power in order to prevent the execution of a law.[7]

It is beyond the power of executive or administrative officers or bodies to exercise, question, interfere with, or limit powers conferred on the legislature by the constitution.[8] However, in order to rise to the level of a constitutional question, conflict between the executive and legislative branches must be clear and at least apparently incapable of resolution, absent judicial intervention.[9]

The power to make laws is a legislative power, and may not be exercised by executive officers or bodies, either by means of rules, regulations, or orders having the force and effect of legislation, or otherwise.[10] A state constitution may also be said to vest ultimate legislative power in the people themselves although their authority does not extend to executive powers.[11] Asserting the State's interest in the validity of a challenged law, however, is not itself an exclusively executive function, and the proponents of state measures or propositions may also rightfully defend a measure's validity.[12]

The power to alter or repeal laws is also a legislative power,[13] and executive officers or administrative bodies may not, by means of construction, rules and regulations, orders, or otherwise, extend, alter, repeal, fail to give effect to, or, ordinarily, set at naught or disregard laws enacted by the legislature.[14] Thus, the law and its execution are separate and distinct spheres, for purposes of the constitutional separation of powers,[15] and lawmaking is not an executive function.[16] An unlawful conflict or infringement occurs when an administrative agency goes beyond the existing statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own.[17] However, if, in interpreting statutes, an executive branch agency does not add to or detract from the statutes but rather construes them reasonably, it does not impinge on the legislature's power.[18] Amendments of statutes may thus not be made by administrative officers charged with their enforcement since such amendments may only be made by the legislature.[19] Moreover, administrative officials and agencies are empowered to act only in accordance with the standards prescribed by the legislative branch of government.[20] An administrative agency has no powers other than those the legislature has delegated to it, and any excursion by an administrative body beyond its legislative guidelines is treated as a usurpation of constitutional powers vested only in the major branch of government.[21] While an administrative agency has wide discretion when implementing legislation pursuant to statute, it may decide to penalize specific kinds of conduct only when Congress expressly delegated that power to the agency.[22]

In a prosecution for violation of an administrative order, it must clearly appear that the order is one which falls within the scope of the authority conferred on the administrative body.[23] If the legislature has not spoken to grant to the executive the power to take acts enumerated as within the legislative power by the constitution, then the silence must be understood as denying the executive such authority.[24] On the other hand, an executive or administrative agency does not encroach on the constitutional authority of the legislature with respect to a particular subject matter where it exercises with respect to such subject matter administrative powers conferred on it by statute.[25]

The policy or wisdom of a law is for the legislature and not for the executive to determine,[26] and the executive branch is not warranted in departing from the standards set up by a statute because of possible doubts as to the wisdom of the course chosen by the legislature.[27] Executive officers are not, of course, required to observe statutes declared invalid by a competent tribunal.[28] Indeed, an executive branch agency has authority to abrogate a statute which is clearly unconstitutional under a United States Supreme Court decision dealing with a similar law, without having to wait for another court decision specifically declaring the statute unconstitutional.[29]

A construction placed on a statute by the executive, especially if long continued, is entitled to weight in the construction of the act by the judiciary.[30] On the other hand, long continuation of administrative practice incompatible with the requirements of the Constitution cannot overcome responsibility to enforce those requirements of the Constitution.[31]

CUMULATIVE SUPPLEMENT

Cases:

Principles of separation of powers compelled conclusion that Presidential Proclamation indefinitely barring entry by nationals from Iran, Libya, Syria, Yemen, Somalia, and Chad exceeded scope of authority delegated to President under provision of Immigration and Nationality Act governing suspension of entry of any aliens or of any class of aliens into United States based on detriment to United States' interests, strongly suggesting that State of Hawai'i, individuals, and non-profit association of Muslims were likely to succeed on their claim that President exceeded his delegated authority, as required for preliminary injunction to be granted; permitting Proclamation's sweeping exercise of authority effectively would render Act void of requisite intelligible principle delineating general policy to be applied and boundaries of delegated authority. Immigration and Nationality Act § 212, 8 U.S.C.A. § 1182(f); Executive Order 13,769, Jan. 27, 2017, 82 Fed. Reg. 8977, 2017 WL 412752. Hawaii v. Trump, 878 F.3d 662 (9th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 La.—State v. Miller, 857 So. 2d 423 (La. 2003).

2 Nev.—N. Lake Tahoe Fire v. Washoe Cnty. Comm'rs, 310 P.3d 583, 129 Nev. Adv. Op. No. 72 (Nev. 2013).

3 U.S.—Colgate-Palmolive-Peet Co. v. National Labor Relations Bd., 338 U.S. 355, 70 S. Ct. 166, 94 L. Ed. 161 (1949); National Federation of Federal Emp., Local 1622 v. Brown, 645 F.2d 1017 (D.C. Cir. 1981).
Mass.—Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978).
Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).
Wis.—Sinclair v. Department of Health and Social Services, Division of Family Services, 77 Wis. 2d 322, 253 N.W.2d 245 (1977).
Delegation of legislative powers to administrative agencies, see C.J.S., Public Administrative Law and Procedure §§ 97 et seq.
Determination of national interest
Decisions as to what serves "interest" of United States or health, safety, and welfare of its people are best made by Congress alone and not by attorney general and his subordinates.
U.S.—U.S. v. City of Philadelphia, 482 F. Supp. 1248 (E.D. Pa. 1979), judgment aff'd, 644 F.2d 187 (3d Cir. 1980).

4 Wis.—Seider v. O'Connell, 2000 WI 76, 236 Wis. 2d 211, 612 N.W.2d 659 (2000).
Executive revision of clear statutory terms
The President's power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration, but it does not include a power to revise clear statutory terms that turn out not to work in practice.
U.S.—Utility Air Regulatory Group v. E.P.A., 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014).

5 Colo.—Vagneur v. City of Aspen, 2013 CO 13, 295 P.3d 493 (Colo. 2013).

6 Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).

7 Ga.—Perdue v. Baker, 277 Ga. 1, 586 S.E.2d 606 (2003).

8 U.S.—Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952); Sierra Club v. Froehlke, 392 F. Supp. 130 (E.D. Mo. 1975), judgment aff'd, 534 F.2d 1289 (8th Cir. 1976).
Ill.—Inland Real Estate Corp. v. Village of Palatine, 107 Ill. App. 3d 279, 63 Ill. Dec. 234, 437 N.E.2d 883 (1st Dist. 1982).
N.Y.—While You Wait Photo Corp. v. Department of Consumer Affairs of City of New York, 87 A.D.2d 46, 450 N.Y.S.2d 334 (1st Dep't 1982).

9 U.S.—Drinan v. Nixon, 364 F. Supp. 854 (D. Mass. 1973).

10 U.S.—Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 62 Ohio L. Abs. 417, 62 Ohio L. Abs. 473, 26 A.L.R.2d 1378 (1952); Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935); Courtney v. Island Creek Coal Co., 474 F.2d 468 (6th Cir. 1973); Delay v. U.S., 602 F.2d 173 (8th Cir. 1979).
N.H.—Opinion of the Justices, 121 N.H. 552, 431 A.2d 783 (1981).
Tex.—General Elec. Credit Corp. v. Smail, 584 S.W.2d 690 (Tex. 1979).

11 Utah—Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (Utah 2012).

12 Cal.—Perry v. Brown, 52 Cal. 4th 1116, 134 Cal. Rptr. 3d 499, 265 P.3d 1002 (2011).

13 § 280.

14 U.S.—First Investment Annuity Company of America v. Miller, 446 U.S. 981, 100 S. Ct. 2961, 64 L. Ed. 2d 837 (1980); Colgate-Palmolive-Peet Co. v. National Labor Relations Bd., 338 U.S. 355, 70 S. Ct. 166, 94 L. Ed. 161 (1949); National Audubon Soc., Inc. v. Watt, 678 F.2d 299 (D.C. Cir. 1982).
Colo.—Bonacci v. City of Aurora, 642 P.2d 4 (Colo. 1982).
N.C.—Thigpen v. Ngo, 355 N.C. 198, 558 S.E.2d 162 (2002).
Statutes of limitation
Administrative agencies do not possess authority to extend or modify period of limitation prescribed by statute.
Minn.—DeMars v. Robinson King Floors, Inc., 256 N.W.2d 501 (Minn. 1977).
Suspension of statute not shown
Statute, which related to bag limits and hunting in closed season, was repealed by legislature, by operation of another statute, when parks and wildlife commission's proclamation became effective, and thus, commission had not suspended statute so as to violate state constitutional provision that no power of suspending laws was to be exercised except by legislature.
Tex.—McDonald v. State, 615 S.W.2d 214 (Tex. Crim. App. 1981).

15 Ariz.—Valencia Energy Co. v. Arizona Dept. of Revenue, 191 Ariz. 565, 959 P.2d 1256 (1998).

16 La.—State v. Broom, 439 So. 2d 357 (La. 1983).

17 N.M.—In re Adjustments to Franchise Fees Required by Electrical Utility Industry Restructuring Act of 1999, 2000-NMSC-035, 129 N.M. 787, 14 P.3d 525 (2000).

18 Cal.—Sharon S. v. Superior Court, 31 Cal. 4th 417, 2 Cal. Rptr. 3d 699, 73 P.3d 554 (2003).

19 Va.—Volkswagen of America, Inc. v. Smit, 266 Va. 444, 587 S.E.2d 526 (2003).

20 Va.—Cochran v. Fairfax County Bd. of Zoning Appeals, 267 Va. 756, 594 S.E.2d 571 (2004).

21 Ariz.—Facilitec, Inc. v. Hibbs, 206 Ariz. 486, 80 P.3d 765 (2003).

22 D.C.—Mitchell v. District of Columbia, 741 A.2d 1049 (D.C. 1999).

23 Del.—State v. Retowski, 36 Del. 330, 175 A. 325 (Gen. Sess. 1934).
Wash.—State v. Miles, 5 Wash. 2d 322, 105 P.2d 51 (1940).

24 La.—State v. Miller, 857 So. 2d 423 (La. 2003).

25 Ga.—Atkins v. Manning, 206 Ga. 219, 56 S.E.2d 260 (1949).
Idaho—In re The Petition of Idaho State Federation of Labor (AFL), 75 Idaho 367, 272 P.2d 707 (1954).

26 U.S.—U.S. v. Carolina Freight Carriers Corporation, 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971 (1942); In re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299 (M.D. Fla. 1977).
Mass.—Opinion of the Justices to the Senate, 375 Mass. 827, 376 N.E.2d 1217 (1978).

27 U.S.—U.S. v. Carolina Freight Carriers Corporation, 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971 (1942).

28 Tenn.—Prescott v. City of Memphis, 154 Tenn. 462, 285 S.W. 587, 48 A.L.R. 1378 (1926).

29 Alaska—O'Callaghan v. State, Director of Elections, 6 P.3d 728 (Alaska 2000).

30 Ky.—Atlantic Coast Line R. Co. v. Com., 302 Ky. 36, 193 S.W.2d 749 (1946).
N.Y.—Prince v. Davis, 195 Misc. 901, 87 N.Y.S.2d 600 (N.Y. City Ct. 1949).

31 U.S.—Puerto Rico v. Branstad, 483 U.S. 219, 107 S. Ct. 2802, 97 L. Ed. 2d 187 (1987).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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2. Encroachment on Legislature

§ 454. Spending public funds

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2621

Violation of the separation of powers provision of a state constitution occurs when the executive branch, rather than the legislature, determines how, when, and for what purpose public funds shall be applied in carrying on the government.

Violation of the separation of powers provision of a state constitution occurs when the executive branch, rather than the legislature, determines how, when, and for what purpose public funds shall be applied in carrying on the government.[1] However, a governor has the constitutional prerogative to spend less than the full amount of an appropriation but is not free to withhold funds or otherwise fail to execute the law on the basis of views regarding the social utility or wisdom of the law because a governor may not totally negate a legislative policy decision that lies at the core of the legislative function.[2] Conversely, administrative agencies lack the power to require the legislature to appropriate money.[3] Members of the executive branch do not have the ability to transfer funds from those to whom the General Assembly has appropriated money, where there is no provision in the state constitution allowing such to occur, and moreover, the General Assembly cannot delegate this legislative power even if it so desires.[4]

Insufficient budget.

If the legislative department fails to appropriate funds deemed sufficient to operate the executive department at a desired level of services, the executive department must serve the citizenry as best it can with what it is given.[5]

Footnotes

1 N.M.—State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (1998).
Executive agency's investment charge
A public utilities commission's electric program investment charge does not violate the separation of powers doctrine by usurping the legislature's authority over appropriations and taxation.
Cal.—Southern California Edison Company v. Public Utilities Commission, 227 Cal. App. 4th 172, 173 Cal. Rptr. 3d 120 (2d Dist. 2014), as modified, (June 18, 2014).

2 Vt.—Hunter v. State, 177 Vt. 339, 2004 VT 108, 865 A.2d 381 (2004).

3 Cal.—Carmel Valley Fire Protection Dist. v. State, 25 Cal. 4th 287, 105 Cal. Rptr. 2d 636, 20 P.3d 533 (2001).

4 S.C.—State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623, 164 Ed. Law Rep. 930 (2002).

5 Ky.—Fletcher v. Com., 163 S.W.3d 852 (Ky. 2005).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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2. Encroachment on Legislature

§ 455. Encroachment on legislature by prosecutor or administrative enforcement officer

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2621
West's Key Number Digest, District and Prosecuting Attorneys 8(4), 8(6)

The executive power includes prosecutorial discretion, and this discretion includes the power to plea bargain and choose from among numerous legislatively delineated offenses in making charging decisions or bringing administrative enforcement actions.

The executive power is used to collect evidence and seek an adjudication of guilt in a particular case while, in contrast, it is within the sphere of legislative authority to define crimes and sentences.[1] The prosecution power resides in the executive department,[2] including decisions on whether or not to prosecute a particular defendant,[3] or plea bargain with a criminal defendant.[4] The executive department may assemble and introduce evidence of a crime, within the bounds of the law, even against a member of the legislative branch.[5]

Prosecutorial discretion is rooted in the separation of powers and due process.[6] Therefore, the executive department has discretion over which charges to file[7] and when and to whom immunity from prosecution will be granted.[8] The executive's

exclusive authority to decide whether to prosecute, as well as to decide which of several alternative statutory sections a defendant will be charged with violating, does not impinge upon the separation of powers.[9]

Where the finding of a nonstatutory aggravating factor is not a prerequisite to imposing a death sentence, a prosecutor is not "making law" in violation of the separation of powers doctrine by alleging a nonstatutory aggravating factor; the prosecutor's advocacy does not itself criminalize conduct or increase the maximum penalty to which a particular defendant is exposed.[10]

Administrative enforcement; interpretation of a legislative act.

The interpretation of a legislative act by an administrative agency charged with its enforcement, though not conclusive, is generally given great weight by a reviewing court although an administrative agency cannot usurp legislative powers or contravene a statute.[11]

Footnotes

1 Minn.—State v. Zais, 790 N.W.2d 853 (Minn. Ct. App. 2010), aff'd, 805 N.W.2d 32 (Minn. 2011).

2 Minn.—State v. Zais, 790 N.W.2d 853 (Minn. Ct. App. 2010), aff'd, 805 N.W.2d 32 (Minn. 2011).

3 U.S.—U.S. ex rel. Reagan v. East Texas Medical Center Regional Healthcare System, 274 F. Supp. 2d 824 (S.D. Tex. 2003), aff'd, 384 F.3d 168 (5th Cir. 2004).
Cal.—Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).
Mass.—Com. v. Clerk-Magistrate of West Roxbury Div. of Dist. Court, 439 Mass. 352, 787 N.E.2d 1032 (2003).

4 Wash.—State v. Rice, 159 Wash. App. 545, 246 P.3d 234, 264 Ed. Law Rep. 400 (Div. 2 2011), aff'd on other grounds, 174 Wash. 2d 884, 279 P.3d 849 (2012).

5 Pa.—Com. v. Feese, 2013 PA Super 255, 79 A.3d 1101 (2013), as corrected, (Jan. 16, 2014).

6 Cal.—Gananian v. Wagstaffe, 199 Cal. App. 4th 1532, 132 Cal. Rptr. 3d 487, 273 Ed. Law Rep. 346 (1st Dist. 2011).

7 Cal.—Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).
Minn.—Johnson v. State, 641 N.W.2d 912 (Minn. 2002).
S.C.—State v. Burdette, 335 S.C. 34, 515 S.E.2d 525 (1999).

8 Pa.—Com. v. Doolin, 2011 PA Super 133, 24 A.3d 998 (2011).

9 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).

10 N.H.—State v. Addison, 165 N.H. 381, 87 A.3d 1 (2013).

11 Ala.—Pleasure Island Ambulatory Surgery Center, LLC v. State Health Planning and Development Agency, 38 So. 3d 739 (Ala. Civ. App. 2008).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

IV. Distribution of Governmental Powers and Functions

D. Executive Powers and Functions

2. Encroachment on Legislature

§ 456. Modifying state law or promulgating administrative regulations; policymaking

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2621

A governor, and his or her executive agencies, lack the authority to change or amend state law since such power falls exclusively to the legislative branch. However, the power to make rules and regulations to carry out the provisions of a statute is not an exclusively legislative power and in some cases may be exercised by executive branch officers.

A governor lacks the authority to change or amend state law since such power falls exclusively to the legislative branch.[1] Although the power to make rules and regulations[2] carrying out the provisions of a statute is not an exclusively legislative power and is also administrative in nature,[3] the discretion of a legislative body, because of its formal role as a formulator of public policy, is much broader than that of an administrative board.[4] An administrative agency does not have any broad authority to make laws; it only possesses the power to adopt regulations carrying into effect the will of the legislature,[5] and if an administrative rule exceeds the statutory authority established by the legislature, the agency has usurped the legislative function thereby violating the separation of powers.[6] An administrative agency within the executive branch may not under the guise of rule-making engage in basic policy determinations reserved to the legislature,[7] nor may it substitute its judgment for that of the legislature.[8] Executive boards or agencies may be held to have exceeded their legislative authority when they enact

laws that do not simply supplement the existing legislation.[9] Thus, an administrative agency should merely fill in the legislative gaps to effectuate the purpose of a legislative act.[10]

Footnotes

1 Fla.—Florida House of Representatives v. Crist, 999 So. 2d 601 (Fla. 2008).

2 Mo.—Missouri Coalition for Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. 1997), as modified on denial of reh'g, (Feb. 25, 1997).

3 U.S.—I.N.S. v. Chadha, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983).

Pa.—Com. v. Smoker, 177 Pa. Super. 435, 110 A.2d 740 (1955).

Administrative rules and regulations in general, see C.J.S., Public Administrative Law and Procedure §§ 207 et seq.

4 Conn.—MacKenzie v. Planning and Zoning Com'n of Town of Monroe, 146 Conn. App. 406, 77 A.3d 904 (2013).

Legislature's role to declare policy

Ohio—Williams v. Spitzer Autoworld Canton, L.L.C., 122 Ohio St. 3d 546, 2009-Ohio-3554, 913 N.E.2d 410, 69 U.C.C. Rep. Serv. 2d 545 (2009).

5 Md.—Bozeman v. Disability Review Bd. of Prince George's County Police Pension Plan, 126 Md. App. 1, 727 A.2d 384 (1999).

6 Ohio—McFee v. Nursing Care Mgt. of Am., Inc., 126 Ohio St. 3d 183, 2010-Ohio-2744, 931 N.E.2d 1069 (2010).

7 Cal.—Gerard v. Orange Coast Memorial Medical Center, 234 Cal. App. 4th 285, 183 Cal. Rptr. 3d 721 (4th Dist. 2015).

N.Y.—Ford v. New York State Racing and Wagering Bd., 24 N.Y.3d 488, 999 N.Y.S.2d 826, 24 N.E.3d 1090 (2014).

8 Kan.—In re Tallgrass Prairie Holdings, LLC, 50 Kan. App. 2d 635, 333 P.3d 899 (2014).

9 N.Y.—New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health and Mental Hygiene, 23 N.Y.3d 681, 992 N.Y.S.2d 480, 16 N.E.3d 538 (2014).

Where executive branch did not create new rules on a "clean slate"

A governor's executive order and the state department of health's regulations did not violate the doctrine of separation of powers where the governor and department did not write on a clean slate, creating their own comprehensive set of rules without the benefit of legislative guidance, but rather they merely filled in the details of broad legislation describing overall policies.

N.Y.—Concerned Home Care Providers, Inc. v. New York State Dept. of Health, 45 Misc. 3d 703, 994 N.Y.S.2d 789 (Sup 2014).

10 Or.—Chevron U. S. A., Inc. v. Motor Vehicles Division, 49 Or. App. 1099, 621 P.2d 668 (1980).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

IV. Distribution of Governmental Powers and Functions

D. Executive Powers and Functions

2. Encroachment on Legislature

§ 457. Veto power

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2621

The power to approve or veto bills is a legislative rather than an executive function.

The power conferred on the chief executive to approve or veto bills passed by the legislature is not strictly an executive but a legislative function.[1] As such, it is limited in its exercise by a constitutional prohibition against an exercise by the executive of powers conferred exclusively on the legislature by the constitution.[2] Thus, a state governor may have the ability, after the legislature passes an appropriation act, to veto items or sections contained within the act.[3]

Under a constitution making no exception to laws which are subject to veto, it has been held that no exception can be made on the theory that a veto may constitute an encroachment on legislative powers.[4]

Footnotes

1 Kan.—State v. French, 133 Kan. 579, 300 P. 1082 (1931).
Neb.—Elmen v. State Bd. of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).
2 Neb.—Elmen v. State Bd. of Equalization and Assessment, 120 Neb. 141, 231 N.W. 772 (1930).
3 S.C.—State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623, 164 Ed. Law Rep. 930 (2002).
4 Wash.—State ex rel. Greive v. Martin, 63 Wash. 2d 126, 385 P.2d 846 (1963).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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2. Encroachment on Legislature

§ 458. Application of rules; specific instances of encroachment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2621

Under specific circumstances, the executive's actions have been found to encroach upon the legislative branch.

A decision by a state's secretary of the commonwealth to reject a writ of election to fill the seat of a resigning member of the state legislature violates the separation of powers doctrine by intruding on the power of the legislature to issue a writ for a special election.[1] Moreover, where a governor's actions in entering into a compact with an Indian tribe are of a policymaking nature and thus legislative in character, as the compact involves policy decisions including taxation and licensing issues, the governor also violates the separation of powers doctrine.[2] However, an executive branch local health board's regulation that restricts smoking in enclosed public places and specifies a criminal penalty does not usurp legislative power over the creation of crimes and penalties where the legislature deemed that local health board regulations were enforceable in a criminal proceeding, and the board recited the legislatively defined penalty in its regulation merely to provide notice and did not create a new crime and penalty.[3]

A state governor does not have the power to supervise the legislature's implementation of its constitutional authority to regulate state-run lotteries.[4] Likewise, the overhaul of a state's public assistance system, which was effected by the executive branch

through executive action, implemented the type of substantive policy changes reserved to the legislature and thus violated the doctrine of separation of powers.[5] A proposed bill that would give the governor the authority to prevent the appropriation of money from a specific state fund violates the prohibitions against the executive department exercising legislative power.[6] A statute allowing for the withholding of legislators' salaries until passage of an annual state budget does not impermissibly merge or shift the powers between the executive and legislative branches, in violation of the separation of powers doctrine.[7]

CUMULATIVE SUPPLEMENT

Cases:

Only the people's elected representatives in Congress have the power to write new federal criminal laws, and thus, permitting executive officials to define the scope of criminal law could offend the doctrine of separation of powers. U.S. Const. art. 3, § 1 et seq. Valenzuela Gallardo v. Barr, 968 F.3d 1053 (9th Cir. 2020).

Promulgation of Department of Health (DOH) regulation implementing governor's executive order imposing hard cap limiting administrative costs and executive compensation of health care providers receiving state financial assistance or state-authorized funds reflected balancing of costs and benefits according to preexisting guidelines set by the Legislature, rather than new value judgment directed at resolution of a social problem, so as to support finding that regulations did not violate the separation of powers doctrine; enabling statutes reflected Legislature's policy directive that DOH oversee the efficient expenditure of state health care funds to ensure high-quality services, and hard caps accomplished goal by limiting extent to which state funds were used for non-service-related salaries or disproportionately large administrative budgets. N.Y. Public Health Law §§ 201(1)(o), (p), 206(3); N.Y. Social Services Law § 363-a; N.Y. Comp. Codes R. & Regs. tit. 10, § 1002.1. LeadingAge New York, Inc. v. Shah, 32 N.Y.3d 249, 90 N.Y.S.3d 579, 114 N.E.3d 1032 (2018).

[END OF SUPPLEMENT]

Footnotes

1 Pa.—Perzel v. Cortes, 582 Pa. 103, 870 A.2d 759 (2005).

2 N.Y.—Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003).

3 W. Va.—Foundation For Independent Living, Inc. v. The Cabell-Huntington Bd. of Health, 214 W. Va. 818, 591 S.E.2d 744 (2003).

4 R.I.—Almond v. Rhode Island Lottery Com'n, 756 A.2d 186 (R.I. 2000).

5 N.M.—State ex rel. Taylor v. Johnson, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768 (1998).

6 Mass.—In re Opinion of the Justices to the Senate, 430 Mass. 1201, 717 N.E.2d 655 (1999).

7 N.Y.—Cohen v. State, 94 N.Y.2d 1, 698 N.Y.S.2d 574, 720 N.E.2d 850 (1999).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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D. Executive Powers and Functions

3. Encroachment on Judiciary

a. General Powers Exercised by Executive

§ 459. Executive encroachment on the judiciary, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623

Although the distinction between the executive and judicial powers is often unclear, they do differ; the executive department has the general power to execute and carry out the laws while the judicial department has the power to interpret the constitution and laws, apply them, and decide controversies.

Although for purposes of constitutional separation of powers the distinction between the executive and judicial powers is often unclear, they do differ; the executive department has the general power to execute and carry out the laws while the judicial department has the power to interpret the constitution and laws, apply them, and decide controversies.[1] There is thus a vital distinction, related to the constitutional separation of powers, between the functions of judicial and administrative tribunals, and care should be taken that there shall be no encroachment by one on the other.[2] Indeed, occasions for constitutional confrontation between executive and judicial branches should be avoided whenever possible.[3] A sensitivity to the separation of powers doctrine suggests that a governor should look to the state's attorney general as his primary legal advisor before submitting a request for an advisory opinion to a state court.[4]

The courts need no license from an executive branch of the government to carry out their judicial functions,[5] and the executive branch of government has no power to impose a rule of civil trial procedure on the courts.[6] On the other hand, the performance of mere ministerial duties is not objectionable as constituting an exercise of judicial powers.[7] Moreover, such officers or bodies may as an incident to the exercise of their executive or administrative powers exercise judgment and discretion,[8] or exercise powers, of a judicial or quasi-judicial nature.[9] Although it has been held that it is the state constitution and not the nature of a function which an entity performs that determines whether or not it is performing a judicial function,[10] ordinarily, whether a function performed by executive or administrative officers or boards is judicial or quasi-judicial must be determined from its nature and attributes, and the law applicable thereto,[11] and the test, generally, is whether the act in question is reasonably necessary or incidental to the carrying out of an executive or judicial function.[12] In any event, an entity does not exercise judicial power if its decision is not final, binding, or enforceable.[13]

So, in general, the determination of questions of law is a judicial function which cannot be exercised by executive officers.[14] Thus, although such officers may exercise a reasonable discretion in construing the laws under which they are required to act,[15] the construction of constitutions[16] or statutes[17] is not an executive or administrative function but a function reserved exclusively to the judiciary; and a construction by such an officer or body is not binding on the judiciary.[18] However, the executive branch, as well as the judicial, is charged with upholding the state constitution, and there is no bar to an executive agency undertaking to enforce the constitution even if it is the courts that may have the final word.[19] Moreover, administrative agencies do not exceed their constitutional authority by utilizing the court system as a means of enforcing their orders provided that the orders are subject to direct review by the courts.[20]

Executive officers cannot fix the meaning of words used by the courts, but they may interpret their own rules and the phrases in them[21] although such an interpretation is not controlling on the courts if it is plainly erroneous and inconsistent with the rule or regulation.[22] Presumptions, declared by administrative agencies, are not binding on the courts.[23] The question of the jurisdiction of an executive officer or board is a judicial one to be decided only by the courts and not by such officer or board.[24]

Where a question has been decided by the courts, executive officers are bound thereby,[25] and may not change or modify such decision, or require the courts to do so.[26] The President cannot direct courts to provide a review and reconsideration of a decision in a particular case since this intrudes into the domain of the judiciary.[27] Judgments, within the powers vested in the courts by constitutional provisions, may not lawfully be revised, overturned, or refused faith and credit by the executive department of government.[28] However, it has been held that an executive official vested with quasi-legislative authority is not barred from altering a rule so that a judicial interpretation regarded as ill-conceived will have no future application.[29]

Executive officers may not adjudicate property[30] or contractual[31] rights or determine the liability of persons for acts causing property damages.[32] An administrative agency may not independently determine the outer limits of its statutory power, that being a judicial function.[33]

The power to punish for contempt is a judicial power which, in the absence of an express provision in the constitution to other effect, is reserved exclusively to the courts and cannot be exercised by executive officers.[34] Furthermore, regulations setting forth the procedure for obtaining and enforcing court orders to procure convicted sex offenders' blood samples that are couched in mandatory terms and compel the judiciary to issue compliance orders against inmates whenever requested by

the State and create a mandatory contempt sanction violate the separation of powers by encroaching on the court's inherent contempt powers.[35]

The authority and responsibility for determining the necessity and propriety of expenditures from the judicial budget rests solely with the judicial branch and is not subject to executive regulations.[36]

Footnotes

1 Iowa—Doe v. State, 688 N.W.2d 265 (Iowa 2004).

2 N.J.—Application of Plainfield-Union Water Co., 14 N.J. 296, 102 A.2d 1 (1954).

3 U.S.—Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004).

4 Mass.—Answer of the Justices to the Governor, 444 Mass. 1201, 829 N.E.2d 1111 (2005).

5 Utah—In re Olson, 111 Utah 365, 180 P.2d 210 (1947).

6 **Imposition of conditions on inspection of documents by court**
U.S.—Bowers v. U.S. Dept. of Justice, 690 F. Supp. 1483 (W.D. N.C. 1987).

7 Ill.—Du Bois v. Gibbons, 2 Ill. 2d 392, 118 N.E.2d 295 (1954).
Tex.—Harvill v. State, 188 S.W.2d 869 (Tex. Civ. App. Austin 1945), writ refused.

8 U.S.—Delay v. U.S., 602 F.2d 173 (8th Cir. 1979).
Neb.—Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

9 Ohio—Zangerle v. Court of Common Pleas of Cuyahoga County, 141 Ohio St. 70, 25 Ohio Op. 199, 46 N.E.2d 865 (1943).

10 Md.—Shell Oil Co. v. Supervisor of Assessments of Prince George's County, 276 Md. 36, 343 A.2d 521 (1975).

11 Fla.—Florida Motor Lines v. Railroad Com'rs, 100 Fla. 538, 129 So. 876 (1930).

12 Vt.—Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 20 A.2d 117 (1941).

13 Iowa—Cedar Rapids Human Rights Commission v. Cedar Rapids Community School Dist., in Linn County, 222 N.W.2d 391 (Iowa 1974).
N.J.—Suchit v. Baxt, 176 N.J. Super. 407, 423 A.2d 670 (Law Div. 1980).

14 Neb.—Summerville v. Scotts Bluff County, 182 Neb. 311, 154 N.W.2d 517 (1967).
Wash.—State ex rel. Public Utility Dist. No. 1 of Okanogan County v. Department of Public Service, 21 Wash. 2d 201, 150 P.2d 709 (1944).

15 Utah—Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 151 P.2d 467, 153 A.L.R. 1176 (1944).
Construction to preserve provisions
Ohio—Stephenson & Potter v. Glander, 35 Ohio Op. 368, 46 Ohio L. Abs. 203, 67 N.E.2d 14 (B.T.A. 1946).

16 Colo.—Board of County Com'rs of Adams County v. Industrial Com'n, 650 P.2d 1297 (Colo. App. 1982), judgment rev'd on other grounds, 690 P.2d 839, 21 Ed. Law Rep. 703 (Colo. 1984).

17 Colo.—Board of County Com'rs of Adams County v. Industrial Com'n, 650 P.2d 1297 (Colo. App. 1982), judgment rev'd on other grounds, 690 P.2d 839, 21 Ed. Law Rep. 703 (Colo. 1984).
N.Y.—Choice Messenger Service, Inc. v. Hennessy, 97 Misc. 2d 89, 410 N.Y.S.2d 753 (Sup 1978).

18 U.S.—Norwegian Nitrogen Products Co. v. U.S., 288 U.S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933); Commissioner of Internal Revenue v. Winslow, 113 F.2d 418, 133 A.L.R. 405 (C.C.A. 1st Cir. 1940); Walker v. U. S., 83 F.2d 103 (C.C.A. 8th Cir. 1936).
N.Y.—Prince v. Davis, 195 Misc. 901, 87 N.Y.S.2d 600 (N.Y. City Ct. 1949).
Utah—Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 151 P.2d 467, 153 A.L.R. 1176 (1944).

19 Mass.—Samuels Pharmacy, Inc. v. Board of Registration in Pharmacy, 390 Mass. 583, 458 N.E.2d 728 (1983).

20 Mo.—State ex rel. Hilburn v. Staeden, 91 S.W.3d 607 (Mo. 2002).

21 U.S.—Norwegian Nitrogen Products Co. v. U.S., 288 U.S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933).

22 N.Y.—Prince v. Davis, 195 Misc. 901, 87 N.Y.S.2d 600 (N.Y. City Ct. 1949).

23 U.S.—Porter v. Fleishman, 71 F. Supp. 33 (D. Or. 1947).

24 Wash.—State ex rel. Public Utility Dist. No. 1 of Okanogan County v. Department of Public Service, 21 Wash. 2d 201, 150 P.2d 709 (1944).

25 Miss.—Mississippi State Tax Commission v. Brown, 188 Miss. 483, 195 So. 465, 127 A.L.R. 919 (1940).

26 Pa.—In re Moskowitz, 329 Pa. 183, 196 A. 498 (1938).

Utah—Nye v. Bacon, 81 Utah 346, 18 P.2d 289 (1933).

Avenue for change

Avenue for agency to change judicial rulings with which it is displeased is by obtaining appropriate legislative relief.

Colo.—Board of County Com'rs of Adams County v. Industrial Com'n, 650 P.2d 1297 (Colo. App. 1982), judgment rev'd on other grounds, 690 P.2d 839, 21 Ed. Law Rep. 703 (Colo. 1984).

27 U.S.—Ex parte Medellin, 223 S.W.3d 315 (Tex. Crim. App. 2006), aff'd, 552 U.S. 491, 128 S. Ct. 1346, 170 L. Ed. 2d 190 (2008).

Judicial proceedings pursuant to treaties

In deciding the role of federal courts in enforcing subpoenas issued pursuant to a treaty, a court must ensure that its decision does not offend basic separation of powers principles by allowing the encroachment or aggrandizement of one branch at the expense of the other or a branch to impair another in the performance of its constitutional duties.

U.S.—In re Request from the United Kingdom Pursuant to the Treaty between the Government of the U.S. and the Government of the United Kingdom on Mut. Assistance in Criminal Matters in the Matter of Dolours Price, 718 F.3d 13 (1st Cir. 2013).

28 U.S.—Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948); Delay v. U.S., 602 F.2d 173 (8th Cir. 1979); Dixon v. McMullen, 527 F. Supp. 711 (N.D. Tex. 1981).

Ind.—State ex rel. Mass. Transp. Authority of Greater Indianapolis v. Indiana Revenue Bd., 144 Ind. App. 63, 253 N.E.2d 725 (1969).

Equally applicable to lowest federal court

U.S.—Cerro Metal Products v. Marshall, 467 F. Supp. 869 (E.D. Pa. 1979).

29 U.S.—Cerro Metal Products v. Marshall, 467 F. Supp. 869 (E.D. Pa. 1979).

30 U.S.—Sullivan v. State of Sao Paulo, 122 F.2d 355 (C.C.A. 2d Cir. 1941).

Cal.—Laisne v. State Bd. of Optometry, 19 Cal. 2d 831, 123 P.2d 457 (1942).

31 U.S.—U S v. Hendrickson, 53 F.2d 797 (C.C.A. 10th Cir. 1931).

Ill.—Toledo, P. & W. R. R. v. Brown, 375 Ill. 438, 31 N.E.2d 767 (1940).

32 Vt.—Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 20 A.2d 117 (1941).

33 U.S.—Social Sec. Bd. v. Nierotko, 327 U.S. 358, 66 S. Ct. 637, 90 L. Ed. 718, 162 A.L.R. 1445 (1946); Wayne State University v. Cleland, 440 F. Supp. 806 (E.D. Mich. 1977).

34 Colo.—People v. Swena, 88 Colo. 337, 296 P. 271 (1931).

35 Ill.—Murneigh v. Gainer, 177 Ill. 2d 287, 226 Ill. Dec. 614, 685 N.E.2d 1357 (1997).

36 Ky.—Martin v. Administrative Office of Courts, 107 S.W.3d 212 (Ky. 2003).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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3. Encroachment on Judiciary

a. General Powers Exercised by Executive

§ 460. Adjudication of validity of statute

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623

Executive officers, boards, or commissions have no power to adjudicate the validity or invalidity of legislative acts.

Executive officers, boards, or commissions have no power to adjudicate the validity or invalidity of legislative acts.[1] Thus, executive officers have no power to declare a statute or ordinance unconstitutional[2] or to disregard the terms of the statute in the absence of a judicial determination that it is unconstitutional, based solely upon the official's opinion that the governing statute is unconstitutional.[3] Rather, executive officers must assume a statute to be valid until it is declared otherwise by the courts[4] unless a determination of its validity does not require the exercise of judicial judgment.[5] Likewise, an administrative body cannot make a binding determination that a statute under which it presumes to act is constitutional.[6]

Whether the acts of an executive officer or administrative agency violate constitutional rights[7] or are without statutory authority[8] are matters for determination by the courts, not by executive officers.

Footnotes

1 Fla.—Adams Packing Ass'n, Inc. v. Florida Dept. of Citrus, 352 So. 2d 569 (Fla. 2d DCA 1977).
Ohio—Rahal v. Liquor Control Commission, 1 Ohio App. 2d 263, 30 Ohio Op. 2d 287, 204 N.E.2d 535 (10th Dist. Franklin County 1965).

2 Colo.—Woldt v. People, 64 P.3d 256 (Colo. 2003).
Ohio—Maloney v. Rhodes, 45 Ohio St. 2d 319, 74 Ohio Op. 2d 499, 345 N.E.2d 407 (1976).
Contested proceeding
The facial constitutionality of a statute may not be determined by an administrative tribunal in a contested case proceeding.
Tenn.—Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446 (Tenn. 1995).

3 Cal.—Lockyer v. City and County of San Francisco, 33 Cal. 4th 1055, 17 Cal. Rptr. 3d 225, 95 P.3d 459 (2004).

4 Ohio—East Ohio Gas Co. v. Public Utilities Commission, 137 Ohio St. 225, 18 Ohio Op. 10, 28 N.E.2d 599 (1940).
Wis.—State ex rel. Martin v. Zimmerman, 233 Wis. 16, 288 N.W. 454 (1939).
Refusal to proceed
Generally, an administrative officer cannot refuse to proceed in accordance with statutes because he or she believes them to be unconstitutional.
Mass.—Attorney General v. School Committee of Essex, 387 Mass. 326, 439 N.E.2d 770, 6 Ed. Law Rep. 382 (1982).

5 **Invalidity of introduction and passage**
Fla.—Dowling v. W.R. Hodges & Son, 131 Fla. 672, 179 So. 702 (1938).

6 Colo.—Kinterknecht v. Industrial Commission, 175 Colo. 60, 485 P.2d 721 (1971).

7 U.S.—A. & M. Brand Realty Corp. v. Woods, 93 F. Supp. 715 (D. D.C. 1950).
Fla.—Department of Revenue of Florida v. Young American Builders, 330 So. 2d 864 (Fla. 1st DCA 1976).

8 Mich.—Kunzig v. Liquor Control Commission, 327 Mich. 474, 42 N.W.2d 247 (1950).
W. Va.—Crank v. McLaughlin, 125 W. Va. 126, 23 S.E.2d 56 (1942).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

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3. Encroachment on Judiciary

a. General Powers Exercised by Executive

§ 461. Exercise of general judicial functions by executive branch

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623

It is for the courts, not an executive branch department, to interpret a state statute and perform acts that are purely judicial in nature.

It is for the courts, not an executive branch department, to interpret a state statute.[1] Thus, administrative agencies cannot expound and apply governing principles of law[2] since an administrative tribunal is not a court and is not part of the judicial branch of government.[3] Hence, it is a well established and universally recognized rule of constitutional law that executive or administrative officers, boards, or commissions may not, by reason of their executive or administrative powers, control or interfere with the courts in the exercise by the courts of judicial functions.[4] Purely judicial acts are not subject to review by the executive branch.[5]

Where an agency possesses both prosecutorial and adjudicatory functions, it must maintain a wall between those functions to prevent an impermissible comingling of its executive and judicial powers.[6] The courts have adjudicated under a variety of facts

and circumstances that executive or administrative officers or bodies may or may not perform particular acts or functions,[7] such as determining the sufficiency of an appeal bond or its alternative, which is a judicial function.[8]

CUMULATIVE SUPPLEMENT

Cases:

Foreign affairs is a domain in which the controlling role of the political branches is both necessary and proper. Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016).

[END OF SUPPLEMENT]

Footnotes

1 Iowa—Locate.Plus.Com, Inc. v. Iowa Dept. of Transp., 650 N.W.2d 609 (Iowa 2002).

2 Conn.—Alvord Inv., LLC v. Zoning Bd. of Appeals of City of Stamford, 282 Conn. 393, 920 A.2d 1000 (2007).

3 Md.—State v. Maryland State Bd. of Contract Appeals, 364 Md. 446, 773 A.2d 504 (2001).
Mich.—Quinton v. General Motors Corp., 453 Mich. 63, 551 N.W.2d 677 (1996).

4 U.S.—Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948); Application of Yamashita, 327 U.S. 1, 66 S. Ct. 340, 90 L. Ed. 499 (1946); American Intern. Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981).
Ohio—State ex rel. Butler v. Demis, 66 Ohio St. 2d 123, 20 Ohio Op. 3d 121, 420 N.E.2d 116 (1981).
Pa.—Reznor v. Hogue, 63 Pa. Commw. 600, 438 A.2d 1013 (1982).

5 Fla.—Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004).

6 Pa.—Jacobs v. Pennsylvania Bd. of Probation and Parole, 24 A.3d 1074 (Pa. Commw. Ct. 2011).

7 Mass.—Clerk of Superior Court for Middlesex County v. Treasurer and Receiver General, 386 Mass. 517, 437 N.E.2d 158 (1982).
N.J.—Worthington v. Fauver, 88 N.J. 183, 440 A.2d 1128 (1982).

8 W. Va.—Frantz v. Palmer, 211 W. Va. 188, 564 S.E.2d 398 (2001).

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§ 462. Appointment, compensation, and removal of officers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623

The doctrine of separation of powers is not violated by constitutional and statutory provisions authorizing the executive to appoint a judge of a court or by a statute authorizing the governor to remove designated officers appointed by him or her.

Constitutional and statutory provisions authorizing the executive to appoint a judge of a court do not constitute an encroachment by the executive branch on the functions of the judicial branch.[1] Moreover, the doctrine of separation of powers permits a governor to remove executive appointees from a judicial standards commission even though the commission is within the judicial branch.[2]

Congress may vest in the President power to remove for good cause an Article III judge from a nonadjudiciary independent agency placed within the judicial branch.[3] Moreover, a statute authorizing the governor to remove designated officers appointed by him or her does not violate the constitutional provision for separation of the executive and judiciary departments[4]

notwithstanding the quasi-judicial nature of the office.[5] Although a statute authorizing a removal by the governor or other executive officer for cause requires a quasi-judicial hearing,[6] or contemplates an investigation by such officer of the grounds of complaint, and the formation of a judgment by him or her,[7] it is generally held not to constitute an encroachment on the judiciary.

Under a provision in the constitution to that effect, a power of removal may be conferred by statute on administrative officers even though such power is regarded as judicial rather than executive.[8]

A statute abolishing a noncivil service title of clerk of a court commissioner and classifying the position in the civil service does not constitute interference with the judiciary even though the clerk may perform certain acts in the absence of the commissioner where such acts are purely ministerial.[9] The attempt of a mayor to determine the validity of an officer's oath and to remove him or her from office without affording the officer an opportunity for defense is an exercise of a judicial or semijudicial function and void.[10]

Footnotes

1 N.Y.—People v. Davis, 67 Misc. 2d 14, 322 N.Y.S.2d 927 (Sup 1971).

2 N.M.—State ex rel. New Mexico Judicial Standards Com'n v. Espinosa, 2003-NMSC-017, 134 N.M. 59, 73 P.3d 197 (2003).

3 U.S.—Mistretta v. U.S., 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989).

4 Me.—Opinion of the Justices of Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196 (Me. 1975).
N.Y.—Steinman v. Nadjari, 49 A.D.2d 456, 375 N.Y.S.2d 622 (2d Dep't 1975).
N.C.—James v. Hunt, 43 N.C. App. 109, 258 S.E.2d 481 (1979).

5 Okla.—Hall v. Tirey, 1972 OK 118, 501 P.2d 496 (Okla. 1972).

6 Me.—Opinion of the Justices of Supreme Judicial Court Given Under the Provisions of Section 3 of Article VI of the Constitution, 343 A.2d 196 (Me. 1975).

7 Mass.—Collins v. Selectmen of Brookline, 325 Mass. 562, 91 N.E.2d 747 (1950).
Utah—Taylor v. Lee, 119 Utah 302, 226 P.2d 531 (1951).

8 W. Va.—State ex rel. Thompson v. Morton, 140 W. Va. 207, 84 S.E.2d 791 (1954).

9 Mich.—Duncan v. Wayne County, 316 Mich. 513, 25 N.W.2d 605 (1947).

10 N.Y.—Hall v. Scanlon, 35 N.Y.S.2d 697 (Sup 1942).

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§ 463. Punishment; pardons and commutations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623
West's Key Number Digest, District and Prosecuting Attorneys 8(8)

While the final disposition of a criminal case is ultimately a matter for the judiciary, the executive branch has the power to decide whether to plea bargain, the power to execute sentences, and the power to administer the parole process.

The final disposition of a criminal case is ultimately a matter for the judiciary.[1] However, the executive branch has the power to decide whether to plea bargain[2] and generally possesses exclusive authority to decide whether to prosecute as well as decide which of alternative statutory sections, which may carry penalties of varying severity, a defendant will be charged with violating.[3] A prosecutor's authority to plea bargain does not invade the sentencing authority reserved to the judiciary,[4] and a plea agreement does not violate the separation of powers doctrine where there is no indication that the court failed to exercise its own discretion in convicting and sentencing the defendant.[5] Also independently of the judiciary, boards of pardons are often granted the power to set parole dates, and it has been held that this arrangement does not offend the separation of powers.[6] The

designation of the place of confinement is similarly considered an administrative and not a judicial act and may be conferred on an administrative officer or body.[7]

Sentencing is an area of shared powers; it is the function of the legislature to prescribe the penalty and the manner of its enforcement, the function of the courts to impose the penalty,[8] and the function of the executive to implement[9] or administer the sentence,[10] as well as to grant paroles.[11] A department of corrections, as an executive agency, generally has no power to change sentences, or to add or remove sentencing conditions, including credit for time served; these powers are vested with the sentencing court.[12]

The broad authority of a state's commissioner of corrections to administer and revoke supervised and conditional release, and to reincarcerate individuals, does not violate the separation of powers.[13] Neither does such authority over supervised and conditional release unconstitutionally impede the judiciary's sentencing authority in violation of the separation of powers.[14] However, the executive branch does violate the separation of powers doctrine when it refuses to carry out the sentence imposed by the court.[15]

An indeterminate sentencing scheme is valid as against the claim that it violates the separation of powers clause because it forces the sentencing judge to pass on the ultimate core judicial function of sentencing to the state's board of pardons and parole.[16] Further, a mandatory sentencing scheme may be valid against the claim that it affords the state's attorney the ability to choose to prosecute the defendant for a crime which carries a mandatory sentence instead of for a crime which carries no such penalty.[17]

A prosecutor's sentencing recommendation, opening and closing statements, and presentation of the probation department's case for revocation of a defendant's probation does not generally upset the separation of powers balance.[18] Therefore, an executive branch officer may properly file a petition with the court to revoke a defendant's probation without violating the separation of powers where the officer is not making any adjudication as to whether the defendant violated probation.[19] However, statutes allowing the transfer of jurisdiction over probation revocation cases from judges to administrative law judges employed by the state's board of parole may encroach on the judicial power and therefore violate the separation of powers doctrine.[20]

Immunity; executive clemency.

The executive branch determines when and to whom immunity from prosecution will be granted.[21] The clemency power is also an executive function[22] as is the power to grant pardons.[23] The reduction of a final sentence may, in certain jurisdictions, be considered the equivalent of a commutation, a power constitutionally reserved solely to the executive branch of state government, and thus held to not violate the separation of powers.[24] The executive power to grant clemency is, in certain states, guarded as being one of the governor's only checks upon another branch of government.[25] In contrast, the power to adjudicate the legality of a sentence or to add or delete sentencing conditions is not a proper executive function.[26]

Prison discipline.

Prison discipline is an exercise of executive power.[27]

CUMULATIVE SUPPLEMENT

Cases:

Trial court improperly converted defendant's probation to administrative probation, since only the Department of Corrections could transfer a probationer to administrative probation and only upon the satisfactory completion of half the term of probation. State v. Thomas, 260 So. 3d 399 (Fla. 4th DCA 2018).

[END OF SUPPLEMENT]

Footnotes

1 Minn.—Johnson v. State, 641 N.W.2d 912 (Minn. 2002).

2 Wash.—State v. Rice, 159 Wash. App. 545, 246 P.3d 234, 264 Ed. Law Rep. 400 (Div. 2 2011), aff'd on other grounds, 174 Wash. 2d 884, 279 P.3d 849 (2012).

3 N.H.—In re Opinion Of Justices, 162 N.H. 160, 27 A.3d 859 (2011).
Executive power to decide what cases to prosecute
Minn.—State v. Zais, 790 N.W.2d 853 (Minn. Ct. App. 2010), aff'd, 805 N.W.2d 32 (Minn. 2011).

4 Iowa—State v. Iowa Dist. Court for Shelby County, 308 N.W.2d 27 (Iowa 1981).

5 Minn.—Johnson v. State, 641 N.W.2d 912 (Minn. 2002).

6 Utah—State v. Todd, 2013 UT App 231, 312 P.3d 936 (Utah Ct. App. 2013), cert. denied, 320 P.3d 676 (Utah 2014) and cert. denied, 134 S. Ct. 2309, 189 L. Ed. 2d 190 (2014).

7 S.C.—McLamore v. State, 257 S.C. 413, 186 S.E.2d 250 (1972).

8 Wis.—State v. Horn, 226 Wis. 2d 637, 594 N.W.2d 772 (1999).

9 Pa.—McCray v. Pennsylvania Dept. of Corrections, 582 Pa. 440, 872 A.2d 1127 (2005).

10 Okla.—State ex rel. Mashburn v. Stice, 2012 OK CR 14, 288 P.3d 247 (Okla. Crim. App. 2012).

11 Iowa—Doe v. State, 688 N.W.2d 265 (Iowa 2004).
Md.—DeLeon v. State, 102 Md. App. 58, 648 A.2d 1053 (1994).
Wis.—State v. Horn, 226 Wis. 2d 637, 594 N.W.2d 772 (1999).

12 Pa.—Com. v. Ellsworth, 2014 PA Super 167, 97 A.3d 1255 (2014); Detar v. Beard, 898 A.2d 26 (Pa. Commw. Ct. 2006).

13 Minn.—State v. Schwartz, 628 N.W.2d 134 (Minn. 2001).

14 Minn.—State ex rel. Guth v. Fabian, 716 N.W.2d 23 (Minn. Ct. App. 2006).

15 Fla.—Moore v. Pearson, 789 So. 2d 316 (Fla. 2001).

16 Utah—State v. Telford, 2002 UT 51, 48 P.3d 228 (Utah 2002).

17 Conn.—State v. Darden, 171 Conn. 677, 372 A.2d 99 (1976).

18 Mass.—Com. v. Doucette, 81 Mass. App. Ct. 740, 967 N.E.2d 1136 (2012).

19 Ga.—Wolcott v. State, 278 Ga. 664, 604 S.E.2d 478 (2004).

20 Iowa—Klouda v. Sixth Judicial Dist. Dept. of Correctional Services, 642 N.W.2d 255 (Iowa 2002).

21 Pa.—Com. v. Doolin, 2011 PA Super 133, 24 A.3d 998 (2011).

22 Ariz.—McDonald v. Thomas, 202 Ariz. 35, 40 P.3d 819 (2002).
Ill.—People ex rel. Madigan v. Snyder, 208 Ill. 2d 457, 281 Ill. Dec. 581, 804 N.E.2d 546 (2004).
Md.—DeLeon v. State, 102 Md. App. 58, 648 A.2d 1053 (1994).

23 Fla.—Sandlin v. Criminal Justice Standards & Training Com'n, 531 So. 2d 1344 (Fla. 1988).
Wis.—State v. Horn, 226 Wis. 2d 637, 594 N.W.2d 772 (1999).

24 La.—State v. Surry, 121 So. 3d 804 (La. Ct. App. 2d Cir. 2013), writ denied, 139 So. 3d 1018 (La. 2014).

25 Or.—Haugen v. Kitzhaber, 353 Or. 715, 306 P.3d 592 (2013), cert. denied, 134 S. Ct. 1009, 187 L. Ed. 2d 856 (2014).

26 Pa.—Com. v. Ellsworth, 2014 PA Super 167, 97 A.3d 1255 (2014); McCray v. Pennsylvania Dept. of Corrections, 582 Pa. 440, 872 A.2d 1127 (2005).

27 Ohio—State ex rel. Bray v. Russell, 89 Ohio St. 3d 132, 729 N.E.2d 359 (2000).

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§ 464. Punishment; pardons and commutations—Consent of prosecutor

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623, 2625(2)
West's Key Number Digest, District and Prosecuting Attorneys 8(5), 8(6), 8(8)

Subjecting the exercise of sentencing power to the consent of the prosecuting attorney is an injection of the executive into the province of the judicial branch of government.

Subjecting the exercise of sentencing power to the consent of the prosecuting attorney is an injection of the executive into the province of the judicial branch of government.[1] For example, a prosecutor may not constitutionally exercise a veto power over the decision of a judge to order that a defendant be diverted into a pretrial program of treatment and rehabilitation.[2] Similarly, a statutory requirement that a criminal court secure the prosecutor's consent before it can order a youth authority commitment for a juvenile convicted of a serious offense violates the separation of powers doctrine by allowing a prosecutorial veto after the filing of criminal charges when the proceeding has come within the aegis of the judicial branch.[3] Moreover, once the legislature has defined the range of punishments for a particular offense, the legislature cannot condition the imposition of the sentence by the court upon the prior approval of the prosecutor.[4]

However, statutes have been held not unconstitutional as vesting judicial powers in the prosecuting attorney where they require his or her consent to the suspension of a sentence[5] or to the release on personal recognizance of a person presently at liberty on another bond in another criminal action.[6] Furthermore, a statute providing that the court may sentence a person to a period of probation if the prosecutor so recommends on the ground that such person has provided material assistance in an investigation or prosecution does not constitute an unconstitutional transfer of punishment power to the prosecutor.[7] Likewise, it is not a violation of separation of powers when the prosecutor has the discretion to recommend a downward adjustment of a sentence for a person who assisted in an investigation.[8]

Statutes providing for a sentence upon prosecutorial agreement are not violative of the separation of powers where the court has the power to inquire into, reject, or approve the arrangements.[9] Habitual criminal statutes are not objectionable as delegating judicial discretion to the prosecutor.[10]

CUMULATIVE SUPPLEMENT

Cases:

Ten-year mandatory minimum sentence for conspiracy to distribute and possess with intent to distribute cocaine did not violate separation-of-powers doctrine by granting prosecutors sole discretion in deciding whether to pursue charges that carry mandatory minimum sentences and stripping judicial branch of discretion in sentencing. Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401, 21 U.S.C.A. § 841(b)(1)(A)(ii). United States v. Syms, 846 F.3d 230 (7th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 Cal.—People v. Superior Court (Felmann), 59 Cal. App. 3d 270, 130 Cal. Rptr. 548 (2d Dist. 1976).

2 Cal.—People v. Superior Court (On Tai Ho), 11 Cal. 3d 59, 113 Cal. Rptr. 21, 520 P.2d 405 (1974).

3 Cal.—People v. Thomas, 35 Cal. 4th 635, 27 Cal. Rptr. 3d 2, 109 P.3d 564 (2005), as modified, (June 8, 2005).

4 Minn.—Johnson v. State, 641 N.W.2d 912 (Minn. 2002).

5 Colo.—People ex rel. Carroll v. District Court of Second Judicial Dist., 106 Colo. 89, 101 P.2d 26 (1940).
Dismissal upon program completion
Conditional agreement to dismiss charges at specified future time under accelerated rehabilitative disposition program is result of concurrence between prosecutor and court and does not deviate from constitutionally required separation of powers.
Pa.—Com. v. Kindness, 247 Pa. Super. 99, 371 A.2d 1346 (1977).

6 Colo.—People v. Sanders, 185 Colo. 153, 522 P.2d 735 (1974).

7 N.Y.—People v. Lanzillotti, 79 A.D.2d 618, 433 N.Y.S.2d 476 (2d Dep't 1980).
Lifetime probation
N.Y.—People v. Gardner, 78 Misc. 2d 744, 359 N.Y.S.2d 196 (Sup 1974).

8 U.S.—U.S. v. Ayarza, 874 F.2d 647 (9th Cir. 1989).

9 N.J.—State v. Todd, 238 N.J. Super. 445, 570 A.2d 20 (App. Div. 1990).

10 Kan.—Kowalec v. State, 214 Kan. 779, 522 P.2d 173 (1974).

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§ 465. Fixing term of reprieves

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623

In some jurisdictions, the power to grant reprieves is regarded as not being inherently judicial and may be vested in the executive.

Generally, a governor's power to grant reprieves on such conditions and with such restrictions as he or she thinks proper cannot be limited either by statute or court decision.[1] In some jurisdictions a pardon, under authority expressly conferred on the executive branch of government, is not regarded as an attempt to transcend or interfere with the prerogatives of the judiciary.[2] The chief executive may be found to be without power to revoke a pardon which is regular on its face and has been accepted.[3]

In some jurisdictions, the chief executive may pardon contempts of court,[4] but there is other authority holding that he may not or may not be empowered by the legislature to pardon such contempts.[5]

The power of the chief executive to grant commutations of punishments,[6] and to attach conditions thereto,[7] is not an invasion of the sentencing powers of the court.

Footnotes

1 N.Y.—People v. Larkman, 187 Misc. 135, 64 N.Y.S.2d 277 (County Ct. 1946).

2 Ky.—In re Rudd, 310 Ky. 630, 221 S.W.2d 688 (1949).

3 **Revocation for fraud in procurement**
S.C.—Ex parte Bess, 152 S.C. 410, 150 S.E. 54, 65 A.L.R. 1459 (1929).

4 U.S.—Ex parte Grossman, 267 U.S. 87, 45 S. Ct. 332, 69 L. Ed. 527, 38 A.L.R. 131 (1925).
Mass.—In re Opinion of the Justices, 301 Mass. 615, 17 N.E.2d 906 (1938).

5 Ind.—State v. Shumaker, 200 Ind. 716, 164 N.E. 408, 63 A.L.R. 218 (1928).

6 **From death penalty to life**
Tex.—Stanley v. State, 490 S.W.2d 828 (Tex. Crim. App. 1972).

7 U.S.—Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

IV. Distribution of Governmental Powers and Functions

D. Executive Powers and Functions

3. Encroachment on Judiciary

b. Conferral of Specific Judicial Powers on Executive Officers

§ 466. Conferral of judicial powers on executive or administrative officers, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2624, 2625(1), 2625(2)

Unless the provisions of the constitution empower it to do so, a legislature cannot delegate judicial powers to administrative or executive bodies or officers.

Unless the provisions of the constitution empower it to do so,[1] the legislature may not authorize executive or administrative officers, boards, or commissions to exercise powers which are essentially judicial in their nature or to interfere with the exercise of such powers by the courts.[2] Since the legislature has no strictly judicial functions, it has no power to delegate to a board a function which it does not itself possess.[3]

The power cannot be given an administrative officer or board to adjudicate private litigation[4] and render a judgment binding on the disputants.[5] However, the Federal Constitution does not prohibit states from conferring judicial functions on nonjudicial bodies[6] or from granting to a board power to make a final determination of a legal question.[7]

When the prescribed statutory and court-ordered procedures are followed, a final judgment is issued, and all postjudgment procedures are followed, it is generally considered an invasion of the authority of the judicial branch for a legislature to pass a law allowing the executive branch to interfere with the final judicial determination.[8]

Merely ministerial duties.

Where the duties of an officer or board are merely ministerial or administrative, the statute imposing such duties is not objectionable on the ground that it confers judicial powers.[9] A statute is not unconstitutional as delegating to a board or commission judicial powers because power is conferred to prescribe reasonable regulations to carry out the provisions of the statute.[10] Where the legislature delegates to a court the duty of dissolving a corporation, which is purely an administrative matter, a provision authorizing an administrative officer to revive a corporation thus dissolved is not unconstitutional.[11]

CUMULATIVE SUPPLEMENT

Cases:

A probation officer cannot grant permission to associate when a condition of supervised release otherwise bars association; only Article III judges can make that call. U.S. Const. art. 3, § 2, cl. 1. United States v. Lee, 950 F.3d 439 (7th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Ala.—Ex parte Darnell, 262 Ala. 71, 76 So. 2d 770 (1954).
Cal.—Ex parte Phyle, 30 Cal. 2d 838, 186 P.2d 134 (1947).

2 Fla.—Canney v. Board of Public Instruction of Alachua County, 278 So. 2d 260 (Fla. 1973).
Ill.—Vissering Mercantile Co. v. Annunzio, 1 Ill. 2d 108, 115 N.E.2d 306, 39 A.L.R.2d 728 (1953).
Tenn.—Hoover Motor Exp. Co. v. Railroad & Public Utilities Commission, 195 Tenn. 593, 261 S.W.2d 233 (1953).

3 Tex.—Sun Oil Co. v. Potter, 182 S.W.2d 923 (Tex. Civ. App. Austin 1944), judgment rev'd on other grounds, 144 Tex. 151, 189 S.W.2d 482 (1945).

4 N.H.—Smith Ins., Inc. v. Grievance Committee, 120 N.H. 856, 424 A.2d 816 (1980).

5 Minn.—Breimhorst v. Beckman, 227 Minn. 409, 35 N.W.2d 719 (1949).
Neb.—Laverty v. Cochran, 132 Neb. 118, 271 N.W. 354 (1937).

6 U.S.—Consolidated Rendering Co. v. State of Vt., 207 U.S. 541, 28 S. Ct. 178, 52 L. Ed. 327 (1908).

7 U.S.—Reetz v. People of State of Michigan, 188 U.S. 505, 23 S. Ct. 390, 47 L. Ed. 563 (1903).
Okla.—State ex rel. Westbrook v. Oklahoma Public Welfare Com'n, 1946 OK 95, 196 Okla. 586, 167 P.2d 71 (1946).

8 Fla.—Bush v. Schiavo, 885 So. 2d 321 (Fla. 2004).

9 Ala.—Opinion of the Justices, 281 Ala. 50, 198 So. 2d 778 (1967).
Iowa—State Bd. of Regents v. Lindquist, 188 N.W.2d 320 (Iowa 1971).

10 Fla.—State ex rel. Watson v. Caldwell, 156 Fla. 618, 23 So. 2d 855 (1945), opinion supplemented, 157 Fla. 70, 24 So. 2d 797 (1946).
Ill.—Department of Finance v. Gandolfi, 375 Ill. 237, 30 N.E.2d 737 (1940).

11 Mass.—Russell Box Co. v. Commissioner of Corporations & Taxation, 325 Mass. 536, 91 N.E.2d 750 (1950).

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

IV. Distribution of Governmental Powers and Functions

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§ 467. Discretionary or quasi-judicial powers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2624, 2625(1)

In general, the legislature may vest executive and administrative officers, boards, or commissions with powers of a quasi-judicial nature.

A state constitution may explicitly allow the legislature to establish regulatory and quasi-judicial functions for administrative agencies.[1] Indeed, the legislature, while acting within the scope of the powers conferred on it, may vest executive and administrative officers, boards, or commissions with powers of a quasi-judicial nature involving the exercise of a large measure of judgment and discretion as an incident to the administration of the law,[2] at least where the legislature in so doing lays down the policy and establishes the standards to be followed by the administrative agency.[3] The general discretion of the originating legislative body, because of its constituted role as formulator of public policy, is much broader than that of an administrative board serving in a quasi-judicial function.[4]

While an administrative body acting as a tribunal has quasi-judicial power, it does not follow that its power is equal to the power of a district court to hear all the facets of a case.[5] Jurisdiction in an administrative hearing, contrary to a court's jurisdiction, is strictly limited by statute, it being a basic rule of law that an administrative agency has only those powers specifically conferred upon it by the legislature.[6] Although administrative entities may constitutionally perform certain functions traditionally reserved to the judiciary, administrative agencies may not pronounce judgments since only a court can enforce administrative orders so that they have the effect of a judgment.[7]

A larger measure of judicial power may be conferred on an administrative tribunal as a necessary incident to the discharge of its functions than in a matter wholly independent of the discharge of its primary duties.[8] However, no power partaking of a judicial nature may be conferred on a mere employee of an administrative board or commission.[9] In construing a statute conferring power on an administrative agency, the court will assume that the legislature did not overlook the constitutional provisions with respect to separation of powers and did not intend to transfer the jurisdiction of a court to such agency but intended at most to confer quasi-judicial powers.[10]

Footnotes

1 Alaska—LeCornu v. State, 2003 WL 393766 (Alaska 2003).
Water rights administration outside judicial process
Regulations adopted by a state engineer to administer the priority of water rights did not conflict with the role of the judiciary in adjudicating water rights; it was proper for the legislature to vest the state engineer with a quasi-judicial function.
N.M.—Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039, 289 P.3d 1232 (N.M. 2012).

2 U.S.—Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940); McLean Trucking Co. v. Occupational Safety and Health Review Com'n, 503 F.2d 8 (4th Cir. 1974).
Ill.—Meadowlark Farms, Inc. v. Illinois Pollution Control Bd., 17 Ill. App. 3d 851, 308 N.E.2d 829 (5th Dist. 1974).
Kan.—Behrmann v. Public Emp. Relations Bd., 225 Kan. 435, 591 P.2d 173 (1979).

3 U.S.—Koplin v. Ohio National Life Insurance Company, 323 U.S. 674, 65 S. Ct. 136, 89 L. Ed. 548 (1944).
Ohio—Belden v. Union Central Life Ins. Co., 143 Ohio St. 329, 28 Ohio Op. 295, 55 N.E.2d 629 (1944).
Standards sufficient
Mont.—City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221 (1971).
Imposing penalties
Sections of act granting discretionary power to board to impose penalties without any standards to guide board are unconstitutional delegation of judicial power.
Ill.—Southern Illinois Asphalt Co., Inc. v. Environmental Protection Agency, 15 Ill. App. 3d 66, 303 N.E.2d 606 (5th Dist. 1973), judgment aff'd, 60 Ill. 2d 204, 326 N.E.2d 406 (1975).

4 Conn.—MacKenzie v. Planning and Zoning Com'n of Town of Monroe, 146 Conn. App. 406, 77 A.3d 904 (2013).

5 Mont.—Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 Mont. 40, 23 P.3d 193 (2001).

6 Mont.—Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 Mont. 40, 23 P.3d 193 (2001).

7 Mo.—State ex rel. Hilburn v. Staeden, 91 S.W.3d 607 (Mo. 2002).

8 Wis.—Town of Holland v. Village of Cedar Grove, 230 Wis. 177, 282 N.W. 111 (1938).

9 Fla.—Florida Dry Cleaning and Laundry Bd. v. Economy Cash & Carry Cleaners, 143 Fla. 859, 197 So. 550 (1940).

10 Vt.—Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 20 A.2d 117 (1941).

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§ 468. Administrative determinations or findings of facts

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623 to 2625(1)

While administrative entities may constitutionally perform certain functions traditionally reserved to the judiciary, they may not pronounce judgments.

While administrative entities may constitutionally perform certain functions traditionally reserved to the judiciary, administrative agencies may not pronounce judgments.[1] The mere power to ascertain or determine facts as an incident to the exercise of administrative functions is not essentially judicial and may be vested in executive officers or bodies[2] with power to issue subpoenas and take testimony.[3] Executive officers may investigate and determine facts as an incident to the performance of their administrative functions[4] and, to that end, may require the furnishing of information and submission to examination.[5] Nevertheless, if the power of such officers to act is challenged, the courts are not bound by the officers' determination of facts.[6]

The fact that it is necessary for such officer or body to interpret a statutory term in order to arrive at its finding of fact does not make the statute invalid as a delegation of judicial power.[7]

Administrative bodies may be empowered to hear and determine controversies incidental to the exercise of powers properly within the scope of executive or administrative authority,[8] and a preliminary determination as to whether a statutory prohibition has been violated is not an unconstitutional exercise of judicial power.[9] State statutes which create and govern a division of administrative law and provide for adjudications by administrative law judges do not confer judicial power on an executive branch agency in violation of a state constitution and do not make the judges part of the judicial branch, even if some wear robes and use a judge's entrance, because the judges make administrative law rulings that are not subject to enforcement and do not have the force of law, and the statutes authorize the judges to exercise quasi-judicial power.[10]

The legislature is free to enact procedures for initial submission of tort claims by prison inmates to an administrative agency for review, for example, of frivolous claims, as long as the action of the administrative agency does not constitute the exercise of original jurisdiction, which is vested by the state constitution in the district court.[11] However, permitting an administrative agency to award general compensatory damages for emotional distress violates the judicial powers clause of a state constitution.[12]

Footnotes

1 Mo.—State ex rel. Hilburn v. Staeden, 91 S.W.3d 607 (Mo. 2002).

2 U.S.—R. F. C. v. Bankers Trust Co., 318 U.S. 163, 63 S. Ct. 515, 87 L. Ed. 680 (1943); Wheeling Corrugating Co. v. McManigal, 41 F.2d 593 (C.C.A. 4th Cir. 1930).
Pa.—Parker v. Children's Hospital of Philadelphia, 483 Pa. 106, 394 A.2d 932 (1978).

3 U.S.—Ritholz v. Indiana State Board of Registration and Examination in Optometry, 45 F. Supp. 423 (N.D. Ind. 1937).
N.Y.—In re Di Brizzi, 303 N.Y. 206, 101 N.E.2d 464 (1951).
Ohio—Meyer v. Parr, 69 Ohio App. 344, 24 Ohio Op. 110, 34 Ohio L. Abs. 448, 37 N.E.2d 637 (1st Dist. Hamilton County 1941).
Evaluation of judge's candidacy
In evaluation by commission of judge's candidacy for reappointment, receipt and consideration of information submitted by present and former assistant United States attorneys with respect to judge's service as judge were not in violation of doctrine of separation of powers.
U.S.—Halleck v. Berliner, 427 F. Supp. 1225 (D.D.C. 1977).

4 Ga.—Dean v. Bolton, 235 Ga. 544, 221 S.E.2d 20 (1975).
Mass.—Human Rights Commission of Worcester v. Assad, 370 Mass. 482, 349 N.E.2d 341 (1976).

5 N.Y.—People v. Clenner, 159 Misc. 860, 289 N.Y.S. 1069 (County Ct. 1936).

6 Cal.—Laisne v. State Bd. of Optometry, 19 Cal. 2d 831, 123 P.2d 457 (1942).
Md.—Dal Maso v. Board of County Com'rs of Prince George's County, 182 Md. 200, 34 A.2d 464 (1943).

7 U.S.—Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S. Ct. 907, 84 L. Ed. 1263 (1940).

8 La.—State ex rel. Johnson v. Higgins, 47 So. 2d 56 (La. Ct. App. 1st Cir. 1950).
Licensing board performing role judicial branch is incapable of performing
The actions of a board of licensure for professional engineers and land surveyors in suspending a land surveyor's license based on a determination that the surveyor's testimony in a prior judicial proceeding violated professional standards did not violate the separation of powers between the judicial and executive branches since the board was performing a role the judicial branch was neither well adapted to perform nor capable of performing; judiciary governed the admissibility of evidence and qualifications of the surveyor as an expert witness while the Board operated to ensure that when the surveyor, as licensee, appeared in court as an expert witness, his testimony conformed to ethical standards associated with his license.
Ken.—Curd v. Kentucky State Bd. of Licensure for Professional Engineers and Land Surveyors, 433 S.W.3d 291 (Ky. 2014).

9 Ohio—Dewine v. Ohio Elections Commission, 61 Ohio App. 2d 25, 15 Ohio Op. 3d 28, 399 N.E.2d 99 (10th Dist. Franklin County 1978).

10 La.—Wooley v. State Farm Fire and Cas. Ins. Co., 893 So. 2d 746 (La. 2005).

11 La.—Pope v. State, 792 So. 2d 713 (La. 2001).

12 Cal.—Walnut Creek Manor v. Fair Employment & Housing Com., 54 Cal. 3d 245, 284 Cal. Rptr. 718, 814 P.2d 704 (1991).

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§ 469. Making decisions not subject to judicial review

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2372, 2625(1)

As a general rule, the legislature cannot, without encroaching on the judiciary in violation of the constitution, confer absolute uncontrolled power or discretion on executive or administrative officers or bodies, make their decisions final, or surrender all court review or control thereof.

A legislature generally cannot, without encroaching on the judiciary in violation of the constitution, confer absolute uncontrolled power or discretion on executive or administrative officers or bodies, make their decisions final, or surrender all court review or control thereof[1] except, under some authority, in case of a public emergency threatening a public calamity.[2] In other words, the legislature's delegation to agencies of the quasi-judicial power to adjudicate rights must include an opportunity for judicial review of the administrative action.[3] Thus, the separation of powers doctrine is violated by a Clean Air Act scheme in which the decision to issue an administrative compliance order, like the decision to file a civil suit in district court, is made not after a full-blown adjudication of whether the Act violation was committed but rather on the basis of any information available to the Administrator of the Environmental Protection Agency since without meaningful judicial review, the statutory scheme works an unconstitutional delegation of judicial power to a non-Article III tribunal.[4]

However, a statute making a decision of a board binding "subject to all rights of action and judicial review provided by law" is not unconstitutional on this ground,[5] and the legislature may accord finality to the findings of a statewide agency that are supported by substantial evidence on the record considered as a whole and are made under sufficient safeguards.[6]

Where the legislature has established laws or rules to guide an administrative officer, the power of determining whether there has been a violation of such laws or rules is a function which must be reserved to the courts and may not be intrusted to an administrative officer.[7] In some jurisdictions, findings of fact or orders by an administrative body cannot be made conclusive but may be made only prima facie reasonable and just,[8] or a full court review must be provided for.[9]

In other jurisdictions, the legislature need not provide for a court review of administrative or fact findings and may make such findings conclusive[10] unless they be shown to be obviously erroneous, in bad faith, or so unfair as to amount to a denial of due process of law.[11] Similarly, it may restrict to specified situations the power of a court to set such findings aside[12] or, a fortiori, deprive the courts of jurisdiction to conduct a hearing de novo as to the facts.[13] Moreover, a statute which prohibits an administrative agency from seeking judicial review of the final decision of an administrative law judge does not violate separation of powers though the situation would be far different where private individuals are prevented from seeking judicial review of an adjudication proceeding.[14]

While an administrative board can proclaim only administrative judgments, such judgments have the same force of obligation and finality as judicial judgments.[15]

Footnotes

1 U.S.—National Harness Mfrs.' Ass'n v. Federal Trade Commission, 268 F. 705 (C.C.A. 6th Cir. 1920); A. & M. Brand Realty Corp. v. Woods, 93 F. Supp. 715 (D. D.C. 1950); Parsons v. Detroit & Canada Tunnel Co., 15 F. Supp. 986 (E.D. Mich. 1936).
Ill.—Vissering Mercantile Co. v. Annunzio, 1 Ill. 2d 108, 115 N.E.2d 306, 39 A.L.R.2d 728 (1953).

2 **State health board**
Tex.—Stockwell v. State, 110 Tex. 550, 221 S.W. 932, 12 A.L.R. 1116 (1920).

3 Ill.—Ford Motor Co. v. Motor Vehicle Review Bd., 338 Ill. App. 3d 880, 272 Ill. Dec. 883, 788 N.E.2d 187 (1st Dist. 2003).

4 U.S.—Tennessee Valley Authority v. Whitman, 336 F.3d 1236 (11th Cir. 2003).

5 La.—Wall v. Close, 203 La. 345, 14 So. 2d 19 (1943).

6 Cal.—Anton v. San Antonio Community Hospital, 132 Cal. App. 3d 638, 183 Cal. Rptr. 423 (4th Dist. 1982).

7 U.S.—Martin v. Federal Sec. Agency, Social Sec. Bd., 73 F. Supp. 482 (W.D. Pa. 1947), judgment aff'd, 174 F.2d 364 (3d Cir. 1949).
Ohio—State ex rel. Squire v. National City Bank of Cleveland, 56 Ohio App. 401, 7 Ohio Op. 396, 24 Ohio L. Abs. 160, 11 N.E.2d 93 (8th Dist. Cuyahoga County 1936).

8 Fla.—State v. Jacksonville Terminal Co., 90 Fla. 721, 106 So. 576 (1925).
Wis.—Ex parte Kreutzer, 187 Wis. 463, 204 N.W. 595 (1925).
Construction of statute
Provision in unemployment compensation statutes, that judicial review should be confined to questions of law, should be read with other provisions as manifesting intent that nature and scope of judicial review be substantially the same as under workers' compensation statutes, and hence, there was no unconstitutional "delegation of judicial power" by legislature.
Wis.—Boynton Cab Co. v. Giese, 237 Wis. 237, 296 N.W. 630 (1941).

9 Mich.—Fitch v. Board of Auditors of Claims against Manitou County, 133 Mich. 178, 94 N.W. 952 (1903).

10 La.—Patorno v. Department of Public Safety, Drivers' License Division, 226 La. 471, 76 So. 2d 534 (1954).
N.C.—Belk's Dept. Store v. Guilford County, 222 N.C. 441, 23 S.E.2d 897 (1943).

11 U.S.—Silberschein v. U.S., 285 F. 397 (E.D. Mich. 1923), aff'd, 266 U.S. 221, 45 S. Ct. 69, 69 L. Ed. 256 (1924).
Mich.—McCaslin v. Albertson, 279 Mich. 650, 273 N.W. 302 (1937).

12 Mo.—De May v. Liberty Foundry Co., 327 Mo. 495, 37 S.W.2d 640 (1931).

13 Mo.—De May v. Liberty Foundry Co., 327 Mo. 495, 37 S.W.2d 640 (1931).

14 Mo.—Wooley v. State Farm Fire and Cas. Ins. Co., 893 So. 2d 746 (La. 2005).

15 N.H.—In re Opinion of the Justices, 87 N.H. 492, 179 A. 357 (1935).

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§ 470. Local executive officers or boards vested with quasi-judicial authority

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2624, 2625(1)

In general, the constitutional requirement of a separation of executive and judicial powers does not prevent local executive officers or boards from being vested with administrative powers requiring the exercise of discretion of a judicial or quasi-judicial nature.

In many jurisdictions, a statute or ordinance which confers on a local executive or administrative officer or board authority of a judicial nature is, in the absence of a provision in the constitution to the contrary,[1] void.[2] In such a jurisdiction, a statutory scheme that would allow the executive or legislative branches of a municipal government to control or exercise the inherent powers of the municipal court would violate the separation of powers doctrine.[3] On the other hand, in some jurisdictions, constitutional provisions requiring a separation of the executive and judicial powers do not apply to merely local or municipal officers.[4]

In any case, a statute or ordinance which confers upon such officers only executive or administrative powers is valid[5] even though the use of such powers involves the exercise of discretion[6] of a judicial or quasi-judicial nature,[7] such as where a town

planning board takes certain actions based upon its consideration of what the legal ramifications of the actions might be.[8] Administrative powers which may be vested in such officers include the power to make inquiries and findings of fact[9] and, for that purpose, to compel the attendance of witnesses.[10]

The mere exercise of functions in connection with the courts and judicial proceedings by such officers as clerks, recorders, masters, or commissioners does not constitute them a part of the judiciary, and they may not, therefore, be vested by statute with judicial authority[11] in the absence of a provision in the constitution to other effect.[12] Such officers may, however, be authorized to perform a variety of ministerial acts[13] even though the performance of such acts involves the exercise of a certain measure of discretion[14] of a quasi-judicial character.[15]

Footnotes

1 Okla.—Quick v. City of Fairview, 1930 OK 390, 144 Okla. 231, 291 P. 95 (1930).

2 N.M.—Mowrer v. Rusk, 1980-NMSC-113, 95 N.M. 48, 618 P.2d 886 (1980).
Applications of rules with respect to conferring judicial power on local executive officers or boards, generally, see § 471.

3 Nev.—City of Sparks v. Sparks Mun. Court, 302 P.3d 1118, 129 Nev. Adv. Op. No. 38 (Nev. 2013).

4 Cal.—Mariposa County v. Merced Irr. Dist., 32 Cal. 2d 467, 196 P.2d 920 (1948).
Ga.—Ward v. City of Cairo, 276 Ga. 391, 583 S.E.2d 821 (2003).

5 Va.—Fallon Florist v. City of Roanoke, 190 Va. 564, 58 S.E.2d 316 (1950).
W. Va.—State v. Blevins, 131 W. Va. 350, 48 S.E.2d 174 (1948).

6 Ill.—People ex rel. Board of Education of La Prairie Community High School Dist. No. 10 v. Board of Ed. of Bowen Community High School Dist. No. 304, 380 Ill. 311, 43 N.E.2d 1012 (1942).
Mo.—Ex parte Lewis, 328 Mo. 843, 42 S.W.2d 21 (1931).

7 Cal.—Irvine v. Citrus Pest Dist. No. 2 of San Bernardino County, 62 Cal. App. 2d 378, 144 P.2d 857 (4th Dist. 1944).

8 N.Y.—Gabrielli v. Town of New Paltz, 116 A.D.3d 1315, 984 N.Y.S.2d 468 (3d Dep't 2014).

9 Ill.—Du Bois v. Gibbons, 2 Ill. 2d 392, 118 N.E.2d 295 (1954).
Mo.—State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 337 Mo. 855, 87 S.W.2d 147 (1935).

10 N.Y.—Hirshfield v. Cook, 227 N.Y. 297, 125 N.E. 504 (1919).
Administering oath
Act creating office of county highway patrol and investigator and requiring duties to be performed by sheriff and his or her deputies is not unconstitutional as delegating to sheriff judicial functions in empowering sheriff to administer oath.
Ky.—Milliken v. Harrod, 275 Ky. 597, 122 S.W.2d 148 (1938).

11 Del.—State v. Davey, 47 Del. 221, 89 A.2d 871 (Super. Ct. 1952).
Fla.—Lee v. Harllee, 119 Fla. 274, 161 So. 405 (1935).

12 Ala.—Minor v. State, 20 Ala. App. 453, 103 So. 902 (1925).

13 Ind.—Steve v. Colosimo, 211 Ind. 673, 7 N.E.2d 983 (1937).
Mich.—Duncan v. Wayne County, 316 Mich. 513, 25 N.W.2d 605 (1947).

14 Ill.—Stolle v. Mitchell, 309 Ill. 341, 141 N.E. 136 (1923).

15 La.—Baham v. Vernon, 42 So. 2d 141 (La. Ct. App. 1st Cir. 1949).
Wash.—Nichols v. Severtsen, 39 Wash. 2d 836, 239 P.2d 349 (1951).

16 C.J.S. Constitutional Law § 471

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PART I. Nature, Establishment, Amendment, and Construction of Constitutions; Separation of Powers

IV. Distribution of Governmental Powers and Functions

D. Executive Powers and Functions

3. Encroachment on Judiciary

b. Conferral of Specific Judicial Powers on Executive Officers

§ 471. Application of rules; specific instances of encroachment on judiciary

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2623 to 2625(1)

The rules relating to the conferring of judicial powers on executive officers generally or on local executive officers or boards have been applied in determining the validity of numerous particular statutes.

In applying the general rules relating to the conferring of judicial powers on executive officers,[1] the courts have adjudicated numerous particular statutes to be valid or invalid as against the contention of encroachment on the judiciary, including statutes relating to such matters as the admission, discipline, and disbarment of attorneys,[2] the approval by the county governing authority of state court judges' contracts for probation services,[3] the appropriation or condemnation of property for public use,[4] labor relations,[5] licensing businesses or professions,[6] motor vehicles,[7] and schools and school districts.[8]

Footnotes

1 §§ 466 et seq.

2 Cal.—Katz v. Workers' Comp. Appeals Bd., 30 Cal. 3d 353, 178 Cal. Rptr. 815, 636 P.2d 1153 (1981).
Ill.—In re Phelps, 55 Ill. 2d 319, 303 N.E.2d 13 (1973).

3 Ga.—Ward v. City of Cairo, 276 Ga. 391, 583 S.E.2d 821 (2003) (not violative of separation of powers).

4 Mo.—State ex rel. Lane v. Pankey, 359 Mo. 118, 221 S.W.2d 195 (1949).

5 Mich.—Matter of Michigan Employment Relations Commission's Order, 406 Mich. 647, 281 N.W.2d 299 (1979).
Wis.—Layton School of Art and Design v. Wisconsin Employment Relations Commission, 82 Wis. 2d 324, 262 N.W.2d 218 (1978).

6 Ill.—Gadlin v. Auditor of Public Accounts, 414 Ill. 89, 110 N.E.2d 234 (1953).

7 Wash.—Bell v. Department of Motor Vehicles, 6 Wash. App. 736, 496 P.2d 545 (Div. 2 1972).

8 N.M.—McCormick v. Board of Education of Hobbs Municipal School Dist. No. 16, 1954-NMSC-094, 58 N.M. 648, 274 P.2d 299 (1954).
S.C.—Willow Consol. High School Dist. v. Union School Dist. No. 46 of Orangeburg County, 216 S.C. 445, 58 S.E.2d 729 (1950).

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